Supreme Court, U.S.
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In The

Supreme Court of the United States

PLAYGIRL, INC.,

Petitioner,

v.

JOSE SOLANO, JR.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A public figure challenges the use of his photograph on the cover of a magazine, the theme and contents of which he does not like. The cover contains numerous textual and design elements in close juxtaposition. The image of the public figure is accompanied by text on the cover that announces some of the magazine's contents. One of those announcements truthfully states that the public figure is part of a feature inside the magazine. Some of the text on the cover does not reference the public figure in any way, but by virtue of being on the same cover as the image of the public figure, the public figure argues that someone, somewhere might associate such text with him or think he has endorsed the magazine. He asks the Court to impose liability against the magazine for so using his image.

1. Did the Ninth Circuit, in a rejection of this Court's First Amendment jurisprudence, put literary style and design at risk and ensure that truthful messages will be punished and speech chilled when it applied a test for Respondent Solano's false light claim that dramatically lowered the bar for trial – a test that assessed whether any juxtaposition of the diverse design elements and words with multiple meaning that shared the cover with Respondent Solano were "reasonably susceptible" of conveying a defamatory or offensive meaning about him, even if those elements also conveyed truthful messages, both about him and about the many other people and topics contained in the magazine?

QUESTIONS PRESENTED – Continued

2. Did the Ninth Circuit violate its duty under the First Amendment to review the evidence independently, thereby erroneously permitting the case to proceed to trial (1) without addressing one of the required elements of Respondent Solano's claims and without finding the existence of any evidence supporting that element; and (2) based on a finding of actual malice supported by Respondent Solano's biased characterizations of the testimony instead of the testimony itself in its appropriate context?

3. Did the Ninth Circuit run afoul of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), by sending the case to trial on a mere finding of "conflicting" evidence of actual malice, thereby converting the required "clear and convincing" standard for actual malice into a preponderance standard, and by failing to evaluate the "caliber" and "quantity" of the circumstantial and internally compromised evidence upon which it relied to determine whether it met the heightened standard?

4. Did the Ninth Circuit eviscerate Petitioner Playgirl's First Amendment defenses to Respondent Solano's misappropriation of right of publicity claims by applying an overly broad actual malice standard that radically alters the nature and scope of misappropriation actions, shaping them into a tool for public figures to censor speech about themselves that would engulf the law of defamation?

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Playgirl, Inc., a Delaware corporation with its only offices in New York, New York. Petitioner is not publicly traded. No publicly held company owns ten percent (10%) or more of Petitioner's stock. Ritter/Geller Communications, Inc. owns Playgirl, Inc. and Lusso Enterprises, Inc. owns Ritter/Geller Communications, Inc. Petitioner was the Defendant in the District Court, and the Appellee in the Ninth Circuit Court of Appeals.

Respondent

Respondent is Jose Solano, Jr., an individual citizen of the United States, residing in the Central District of California. Respondent was the Plaintiff in the District Court, and the Appellant in the Ninth Circuit Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. 1a-22a) that gives rise to this petition is reported at *Solano v. Playgirl, Inc.*, 292 F.3d 1078 (9th Cir. 2002). The District Court opinion that gave rise to the Ninth Circuit's opinion (App. 1b-29b) is unpublished and was filed on February 12 and entered on February 13, 2001. The District Court's findings supporting its summary judgment opinion (App. 1c-41c) are unpublished and were filed on February 27, 2001.

STATEMENT OF JURISDICTION

The Ninth Circuit's judgment was entered on June 13, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

CALIFORNIA CIVIL CODE § 3344:

(a) Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any

damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars ($750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs.

(b) As used in this section, "photograph" means any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any person, such that the person is readily identifiable.

(1) A person shall be deemed to be readily identifiable from a photograph when one who views the photograph with the naked eye can reasonably determine that the person depicted in the photograph is the same person who is complaining of its unauthorized use.

(2) If the photograph includes more than one person so identifiable, then the person or persons complaining of the use shall be represented as individuals rather than solely as members of a definable group represented in the photograph. A definable group includes, but is not limited to, the following examples: a crowd at any sporting event, a crowd in any street or public building, the audience at any theatrical or stage production, a glee club, or a baseball team.

(3) A person or persons shall be considered to be represented as members of a definable group if they are represented in the photograph solely as a result of being present at the time the photograph was taken and have not been singled out as individuals in any manner.

(c) Where a photograph or likeness of an employee of the person using the photograph or likeness appearing in the advertisement or other publication prepared by or in behalf of the user is only incidental, and not essential, to the purpose of the publication in which it appears, there shall arise a rebuttable presumption affecting the burden of producing evidence that the failure to obtain the consent of the employee was not a knowing use of the employee's photograph or likeness.

(d) For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a).

(e) The use of a name, voice, signature, photograph, or likeness in a commercial medium shall not constitute a use for which consent is required under subdivision (a) solely because the material containing such use is commercially sponsored or contains paid advertising. Rather it shall be a question of fact whether or not the use of the person's name, voice, signature, photograph, or likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required under subdivision (a).

(f) Nothing in this section shall apply to the owners or employees of any medium used for advertising, including, but not limited to, newspapers, magazines, radio and television networks and stations, cable television systems, billboards, and transit ads, by whom any advertisement or solicitation in violation of this section is published or

disseminated, unless it is established that such owners or employees had knowledge of the unauthorized use of the person's name, voice, signature, photograph, or likeness as prohibited by this section.

(g) The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law.

STATEMENT OF THE CASE

Respondent Solano argues that Petitioner Playgirl's use of his photograph along with allegedly suggestive headlines on the cover of a magazine conveyed the false message that he voluntarily posed nude for the magazine and, in doing so, implicitly endorsed the magazine and its content. App. 5a. The District Court rejected that argument, granting summary judgment in favor of Playgirl. App. 1b-29b and 1c-41c. The Ninth Circuit reversed, finding triable issues of fact. App. 1a-22a.

Background

***Playgirl* Magazine.** *Playgirl*, published under the tag-line "Entertainment for Women", is a monthly, internationally distributed, adult content magazine that has been in continuous publication for more than a quarter century. While its issues typically contain photographs of nude men, *Playgirl* has never been just a picture book of nude men, but has always presented significant editorial content aimed at entertaining and informing its female readership. App. 1b-2b; App. 2c.

Jose Solano. Solano was a television actor known for a three-year role (1996-99) as a lifeguard on *Baywatch,* which he admits was one of the most popular television shows in the world at the time. App. 2b; App. 3c and 7c. Along with other male actors on the show, he was often

portrayed shirtless in swim trunks. The show focused on his fit physique, just as the show focused on the female lifeguards' female attributes. Solano does not dispute that he is a "public figure" for purposes of a First Amendment analysis of his claims. App. 10a.

The January 1999 Issue of *Playgirl*. The January 1999 *Playgirl* issue included a broad range of editorial and pictorial features. App. 2a.[1] It included an editorial piece entitled, "*TV Guys – Primetime's sexy young stars make for one steamy season*" that profiled ten "hot" male actors, one of whom was Solano, and their careers. App. 2b-3b; App. 8c-10c; App. 1e-6e. Each biographical profile included a fully-clothed photograph of the subject actor. App. 1e-6e. Playgirl did not take the photographs; it acquired them from photo stock houses. App. 3b. The text accompanying Solano's photograph was very complimentary. App. 2e.

The cover also contained a photograph of Solano purchased from a photo stock house, wearing his *Baywatch* uniform (red swim trunks). App. 1d. Solano does not dispute that his photographs and the text in the article about him are true. App. 17b; App. 10c-11c and 28c.

Cover Lines: As is typical of many popular culture magazines, the Solano cover photograph was surrounded by what are referred to as "cover lines", which announce some of the features in the magazine. App. 17c. There were seven cover lines on the January 1999 cover:

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[1] The issue included film, music and book reviews, an article about an actress on *The Young and the Restless*, a feature answering readers' sex and relationship questions, short stories, horoscopes, a recipe, physical fitness and exercise tips, an interview with a famous author, and other features. It, of course, also presented pictorial pieces that featured men and women in various states of undress.

"TV Guys – Primetime's Sexy Young Stars Exposed"

"12 Sizzling Centerfolds – Ready To Score With You"

"Countdown To Climax – Naughty Ways to Ring in the New Year"

"Toyz in the Hood – The Best in Erotic Home Shopping"

"Bottoms Up! Hot Celebrity Buns"

"Seduce Any Sign In The Zodiac"

"Baywatch's Best Body – Jose Solano"

App. 1d. Of those, only one (*"Baywatch's Best Body – Jose Solano"*) referred directly to Solano. Another (*"TV Guys – Primetime's Sexy Young Stars Exposed"*) referenced the editorial feature in which he and nine other actors were profiled.

The remaining five referred to other features that had nothing to do with Solano: *"12 Sizzling Centerfolds – Ready To Score With You"* referred to an annual editorial and pictorial feature where readers could review the past year's centerfolds and vote for their favorite; *"Countdown To Climax – Naughty Ways to Ring in the New Year"* referred to an editorial feature that described New Year's traditions and suggestions for enjoying a romantic/sexy celebration; *"Toyz in the Hood – The Best in Erotic Home Shopping"* referred to an editorial review of four mail-order companies and home shopping websites; *"Bottoms Up! Hot Celebrity Buns"* referred to a recurring editorial and pictorial feature that asked readers to match a face with a behind; and *"Seduce Any Sign In The Zodiac"* referred to a recurring horoscope feature.

Of the seven cover lines on the January 1999 issue, four happened to overlap small parts of the photograph of Solano. Only two of those (*"TV Guys – Primetime's Sexy Young Stars Exposed"*, *"Baywatch's Best Body – Jose*

Solano") had anything to do with the feature inside the magazine that included his profile. Of the remaining two ("*12 Sizzling Centerfolds – Ready To Score With You*", "*Seduce Any Sign In The Zodiac*"), ½ of the letter "s" on the word "centerfolds" happened to barely touch the image of Solano's shoulder, and "*Seduce Any Sign In The Zodiac*" was the text on the cover that most overlapped with his image.

No Evidence of Any Reader Reaction. Solano provided no evidence from any reader of the magazine as to what that person saw, read or believed, no evidence that anyone who saw the magazine believed he was nude inside, and no evidence that the fact that *some* of the magazines appeared in newsstands in plastic wrapping deterred readers from learning whether the content of the magazine was different than what the cover lines announced.[2]

The Editorial Decisionmaking Process. The editorial decisionmakers who worked on the issue did not believe that the cover implied Solano was nude inside the magazine. Among other reasons, they testified as to their belief that the first cover line ("*TV Guys – Primetime's Sexy Young Stars Exposed*") conveyed that *Playgirl* would have "sexy pictures and information" about the featured men, that the word "exposed" referred to "reportage," or "journalistic exposure," or possibly a "photographic exposure," that, particularly in the context of this particular

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[2] Because of its adult content, a portion of *Playgirl* magazine's print run for newsstands is often sold in plastic shrinkwrap or in partially opaque covers. Approximately 35.33% of the January 1999 issue delivered for sale at newsstands, however, was sold without being wrapped. App. 1f-2f. The Ninth Circuit wrongly asserted (twice) that all of the issues were displayed for sale in plastic wrapping. App. 3a-4a and 9a.

magazine, "exposed" and "nude" referred to two different things, and that they believed that the headlines did not convey that Solano was nude. App. 12c-17c.

Lack of Damage. Solano produced no evidence of any pecuniary injury, of any lost work due to his appearance in the magazine, that anyone had ever mentioned the Playgirl issue to his agents and manager, or that any decline in charity event invitations was due to the publication. App. 16a-17a. No one had ever told him he or she did not want to associate or work with him because he appeared in *Playgirl*. App. 2g-4g. Although he claimed to have suffered "humiliation and embarrassment", he admitted he never sought any type of treatment from any medical professional (App. 17a) and that the alleged embarrassment was not even his, but his family's (App. 4g). He even joked about the incident on the nationally-broadcast *Donny & Marie Show*.[3]

District Court Proceeding

Jurisdiction. Solano filed this action in a California State Court. Pursuant to 28 U.S.C. § 1441(b), Playgirl removed it to the District Court, which has original diversity jurisdiction pursuant to 28 U.S.C. § 1332.

Claims Asserted. Solano asserted three claims: (1) misappropriation of his right of publicity under CALIFORNIA CIVIL CODE § 3344 arising from the two photographs of him in the magazine; (2) common law

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[3] He stated, "[M]y brothers are like, 'Way to go guy!' " as he smiled and held his thumbs up for the camera; hostess Marie Osmond joked about it ("I'm sorry to laugh, I find these things humorous."); and the audience clapped and cheered. App. 4h.

commercial misappropriation of his name, likeness, and right of publicity; and (3) false light invasion of privacy.

Summary Judgment. After discovery closed, Playgirl moved for and was granted summary judgment on all claims. App. B and C. On the false light claim, the District Court found that Solano could not show that Playgirl disclosed information that created a false impression about him (App. 21b), that as a public figure he did not have the right to choose the forum in which his image is used (App. 18b), that the testimony of the two non-managerial short-term employees upon whom Solano relied (Spiezio and O'Rourke) was speculative and non-probative (App. 13c, 16c-17c, and 34c-35c), and failed to meet the required clear-and-convincing standard for actual malice on Playgirl's part regarding the alleged false implication (App. 34c-35c).

On the statutory misappropriation claim, the District Court found that Playgirl's use of the photographs was privileged under the statutory provision protecting uses in connection with any "news" or "public affairs" account (App. 36c-37c), and that Solano failed to provide sufficient evidence to support a finding of a knowing or calculated falsehood by Playgirl in using his photographs (App. 37c). On the common law misappropriation claim, the District Court found that Playgirl's use of the photographs was privileged under the common-law "public interest" defense (synonymous with the "public affairs" defense under the misappropriation statute) and that Solano again provided insufficient evidence of any "calculated falsehood". App. 38c.

The District Court found that Solano's feelings of unhappiness and embarrassment about having his picture appear in the magazine provided no basis for liability and

that to find otherwise for this public figure would impermissibly lead to self-censorship and chill the exercise of free speech. App. 29b; App. 39c-40c.

Ninth Circuit Opinion

The Ninth Circuit reversed the grant of summary judgment and remanded for further proceedings. App. 1a-22a.

False Light. The Ninth Circuit identified the four required elements for the false light tort, but inexplicably only addressed three of them. Focusing on the use of the word "exposed" in a cover line ("*TV Guys – Primetime's Sexy Young Stars Exposed*") that announced a feature inside about ten young actors, including Solano, the Ninth Circuit found that someone "might" think he had appeared nude inside or had posed for or endorsed the magazine. Viewing the cover photograph and cover lines in the context of a magazine like *Playgirl* and its adult content, it found that a triable issue of fact existed as to whether Playgirl had created a false impression about Solano. App. 6a-9a.

Comparing the testimony of the two, low-level employees (Spiezio and O'Rourke) to that of the editorial decisionmakers, the Ninth Circuit also found "conflicting evidence" as to whether a jury could conclude that Playgirl's editors knowingly or recklessly published a misleading cover.[4]

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[4] The malice determination was based in part on the Court taking into account "the typical contents of the magazine," although it separately held that Solano could not prevail if his false light claim were based solely on his being depicted without his consent on the cover of an explicit magazine. App. 7a.

Damages. The Ninth Circuit found that Solano had produced no evidence of any lost work due to the magazine, no evidence that anyone had ever mentioned the Playgirl issue to his agents and manager, and no evidence that any decline in charity event invitations was due to the publication. App. 16a-17a. It also found that Solano's testimony about "personal and familial humiliation and embarrassment" was sufficient to establish a genuine issue with respect to damages, precluding summary judgment. App. 18a.

Misappropriation of Right of Publicity. Relying on *Eastwood v. Superior Court*, 198 Cal. Rptr. 342 (Ct. App. 1983), the Ninth Circuit stated that its finding that there was a genuine issue as to whether Playgirl acted with actual malice meant that the District Court had prematurely applied the newsworthiness exceptions to Solano's claims. App. 20a.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION CREATES AN IMPOSSIBLE STANDARD FOR PUBLISHERS TO MEANINGFULLY EMPLOY, IMPERMISSIBLY INSERTS THE JUDICIARY INTO THE EDITORIAL PROCESS, PERMITS PUNISHMENT OF TRUTHFUL SPEECH, AND WOULD LEAD TO SELF-CENSORSHIP AND A CHILLING OF SPEECH

A. Application Of The Ninth Circuit's "Reasonably Possible" Rule In A Situation Involving A Multiplicity Of Elements With Multiple Potential Meanings Creates An Unacceptable Danger Of Self-Censorship.

This case concerns whether a public figure's challenge to the use of his photograph on the cover of a magazine he does not like, when that image is accompanied by text on

the cover announcing the magazine's contents, one of which announcements truthfully states that he is part of a feature inside the magazine, is properly tested by a rule that first examines each element of the text on the cover, and then asks whether someone, somewhere might think that some such element in combination with any other element *could* imply or suggest something negative about the public figure, even if that text was fully capable of another, truthful and non-negative statement about the public figure.

To find that the case could go to a jury, the Ninth Circuit mined every aspect of every element on the cover, creating a series of tenuous connections, and finding, by inference piled on inference, that (1) even though space on a cover is limited, (2) even though headlines by nature can only convey a small part of the content to which they refer, and (3) even though each headline in some sense accurately described the article it represented, it was "possible" someone could connect all of the disparate elements, united only by their common inclusion on the cover, and associate those elements with the negative one of many possible meanings and think that one or more of the cover elements "suggest" something contrary to what is actually in the contents.

The source of the Ninth Circuit's methodology is the so-called "reasonably possible" test from an earlier defamation decision, *Kaelin v. Globe Communications Corp.*, 162 F.3d 1036, 1040 (9th Cir. 1998). App. 6a. *Globe* newspaper published a headline announcing "*Cops Think Kato Did It . . . He Fears They Want Him For Perjury Say Pals.*" Kaelin argued that the "It" implied he did the two murders for which O.J. Simpson was tried; *Globe* argued that "It" referred to the possible perjury charge. The Ninth Circuit responded, "Even assuming that [the perjury] reading is *reasonably possible*, it is not the only reading that is

reasonably possible as a matter of law. So long as the publication is *reasonably susceptible* of a defamatory meaning, a factual question for the jury exists." *Kaelin*, 162 F.3d at 1040 (emphasis added). App. 6a.

Because *Kaelin* involved a defamation claim and not a false light claim, the *Kaelin* court assessed the meaning conveyed by a single statement alone. Applying that rule to determine whether any combination of multiple and intentionally varied elements on the cover of a magazine conveys a false message is a mistake. In a "false message by juxtaposition" case, the "offensive falsity" of the message results from the association of the plaintiff's name or photograph with something the plaintiff does not like, endorse, approve of, or wish to be associated with. As a practical result, in an environment like that of a magazine cover which uses multiple elements – including images, text, color, and font – to describe a diverse content, courts who are permitted to marshal any and all elements of a magazine cover to find such an association will usually find that one is "reasonably possible" whenever material that a plaintiff does not like is also contained in the magazine and featured on the same cover that includes the plaintiff's name or image, and cases will rarely be decided on summary judgment.

This contravenes the findings of many courts that because protracted litigation has a chilling effect on First Amendment rights, speedy resolution of disputes involving freedom of speech is desirable and summary judgment is a favored remedy. *See, e.g., Shulman v. Group W Prod., Inc.*, 955 P.2d 469, 487 (Cal. 1998); *Good Gov't Group of Seal Beach v. Superior Court*, 586 P.2d 572, 578 (Cal. 1978); *Aisenson v. ABC, Inc.*, 269 Cal. Rptr. 379, 382 (Ct. App. 1990); *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1234 (7th Cir. 1993); *see also Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965). Summary judgment is also widely

recognized as a tool to protect provocative, inflammatory or controversial speech (or speech made in such context) from the ire of juries. In such context, the bar should not be set so low.

The sheer unpredictability of an approach with so many variables, and the room it affords for the exercise of personal bias in the assessment, also chills speech because it provides so little notice to publishers before they publish about what combination of elements will result in liability. Publishers who wish to avoid the risk and expense of a trial will be forced to err on the side of assured safety, which is the essence of a "chilling effect" on speech. *See Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967); *New York Times v. Sullivan,* 376 U.S. 254, 278 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974). Such "self-censorship . . . would be a censorship affecting the whole public, hardly less virulent for being privately administered." *Smith v. California*, 361 U.S. 147, 154 (1959).

The standard therefore creates the very real danger that wit, wordplay, poetic license, compelling design, and simple fun will have to be put aside when writing a magazine cover. The myriad language choices an editor might normally have will be reduced to the most generic, flat, declaratory words possible so no one could possibly read anything from them other than a single, sanitized meaning. Yet style and creativity are the very currency by which publishers differentiate themselves and their message in the marketplace of ideas.

The unpredictability of the "cobbling together" approach is made manifest by the Ninth Circuit's opinion. For example, although there are seven cover lines on the magazine, the Ninth Circuit focused on only two of the allegedly raciest (*"TV Guys – Primetime's Sexy Young Stars Exposed," "12 Sizzling Centerfolds – Ready To Score With You"*) and suggested that they could both be interpreted to

refer to Solano. Yet it ignored the cover line ("*Seduce Any Sign in the Zodiac*") that overlapped his image more than any other line; ignored the fact that the "centerfolds" cover line referred to a recurring feature in the magazine – a reference *Playgirl's* readers certainly would have understood; ignored three more cover lines ("*Countdown To Climax – Naughty Ways to Ring in the New Year*"; "*Toyz in the Hood – The Best in Erotic Home Shopping*"; "*Bottoms Up! Hot Celebrity Buns*"); and discounted the fact that the one line on the magazine that actually referred to Solano used his entire name and the name of his television show in a factual, neutral manner ("*Baywatch's Best Body – Jose Solano*"). Turning to etymology, the Ninth Circuit then accepted the sense of the word "expose" Solano urged–"to engage in indecent exposure (of oneself)", which is a fourth sub-definition of the third definition provided for the word "expose" ("to cause to be visible or open to view") in Merriam-Webster's 2002 COLLEGIATE DICTIONARY – and ignored the other, more common meaning of the word ("to make known," as in journalistic exposé), even though it is that meaning that Playgirl's editors who designed and wrote the cover testified they intended.

In a post-*Solano* world, editors could face the following scenarios:

1. Even though magazines "have a tradition of more colorful, even feisty language, than do dailies" and a "generally freer style of personal expression" (*see Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1304 (8th Cir. 1986)), if liability can be imposed on Playgirl's use of the word "exposed," which bears a truthful meaning in context and which is at worst a pun, editors will be discouraged from using the creative and vibrant speech that is common in magazines of all stripes. This "dumbing down" of the language puts at risk the fun and style of statements long found in mainstream popular media: "Britney Spears Gets

Intimate" (referring to a young singer's personal conversation, not her sexual activity); "Shaun Cassidy Takes It All Off" (referring to a haircut, not a strip show); "Anthony Perkins Goes Psycho" (referring to an actor's role in the famous Hitchcock film, not his mental state). Lottery winners could no longer playfully be described as "getting lucky"; comics could not be described as "slaying" their audiences.

2. If liability can be imposed because some reader somewhere *might* associate all or multiple headlines on a page with the person pictured thereon, then the editor had better not use multiple headlines, had better not use headlines that in any way touch or too closely approach the picture, and had better not vary font, size, color, or style for fear that one headline might be unduly highlighted compared to another and someone might then mistakenly think it refers to the person pictured. *See Smith v. Maldonado*, 85 Cal. Rptr. 2d 397 (Ct. App. 1999) (noting the "substantial" chilling effect on the free flow of ideas and information that would result if writers and public speakers had to make special efforts not to place the "wrong" emphasis on truthful statements). The result is that all publications would end up looking like law reviews. This ignores the reality of variety in the design of magazine covers, including practices common to any frequenter of newsstands – using multiple headlines on a page; overlapping multiple headlines onto the cover image; making the headline that refers to the person depicted on the cover anything but the largest headline on the page; and using statements in quotation marks as entire headlines: "How I Survived My Husband's Abuse."

3. If liability can be imposed for using certain words because of the nature of the publication under scrutiny, then word blacklists will have to be created for each magazine. For example, *Playgirl* would have to cleanse *all*

cover lines of language that could remotely suggest nudity out of a myriad of possible definitional choices if the person depicted on the cover does not appear nude in the magazine or does not endorse other common features of the magazine. An entire glossary of standard headline words and phrases would disappear, but the restriction would impermissibly apply to, and thereby censor, only those magazines that publish nude photos: "Revealed," "Uncovered," "Drops His Guard," "As You've Never Seen Him," "Sneak Peek," "The Naked Truth," "Unwrapped," "Lays It On The Line," and the like.

4. For an illustration outside the context of explicit speech, the Ninth Circuit's greatly lowered standard would permit actor, father, and gun-rights activist Charlton Heston to proceed to trial on a false light theory if he were pictured on the cover of the hypothetical anti-gun magazine, *No-Guns*, with cover lines overlapping his image that read "*Celebrities Come Out in Support of Gun Limits*," "*12 Grieving Fathers Tell You Their Stories*," and, as the smallest headline on the page, "*Heston and the Brady Bill*," where each of the cover lines refers to a different article and only the "Brady Bill" headline refers to an article featuring Heston, one that details his opposition to the gun control measure.[5] In a magazine that has a theme to which a person depicted on its cover objects, many cover lines will almost certainly reflect something the person

[5] This example underscores the inability of the "actual malice" standard to protect against these risks. Using the Ninth Circuit's analysis, evidence of malice would be found if the *No-Guns* editors testified they were aware that Heston is a father and a celebrity, knew he was not one of the celebrities or fathers mentioned by the headlines that surround him without using his name, and were aware of some level of risk, however low, that some reader somewhere might misinterpret the headlines.

finds negative. Common sense counsels that public figures who are the subject of such editorial coverage must bear these minor associations.

This *de facto* creation of judicially-imposed editorial rules improperly inserts courts and juries into decisions of design and literary style that courts have repeatedly insisted are the sole province of editors. *See Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258-59 (1974) ("It has yet to be demonstrated how governmental regulation of [editorial control and judgment] can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. . . . We . . . remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press."; *see also Nebraska Press Ass'n v. Stewart*, 427 U.S. 539, 560-61 (1976).[6]

The risk that the Ninth Circuit's "reasonably possible" rule when applied to a false light claim will force editors to cater to the lowest common denominator is no mere hypothetical risk. In applying the rule here, the Ninth Circuit considered how a casual reader in a supermarket checkout line might understand the cover, even though there is no evidence that *Playgirl* is ever displayed in a supermarket. App. 9a. The First Amendment would abhor

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[6] The Circuits and the California courts echo the sentiment. "Complaints or disagreements about choice of language are editorial decisions that do not give rise to liability." *Newton v. NBC, Inc.*, 930 F.2d 662, 685-86 (9th Cir. 1990) ("Editorial decisions . . . are best left to editors, not to judges and juries."); *Janklow*, 788 F.2d at 1304 ("[T]he First Amendment cautions courts against intruding too closely into questions of editorial judgment, such as the choice of specific words."); *Baker v. Los Angeles Herald Examiner*, 721 P.2d 87, 93 (Cal. 1986) (noting the undesirable chilling effect that would result "[i]f the exercise of literary style were always subject to the threat of a defamation action").

a rule that is crafted to protect the whim of a supermarket shopper's two-second take on a magazine cover. *See, e.g., Forsher v. Bugliosi,* 608 P.2d 716, 722-24 (Cal. 1980) ("In determining the defamatory nature of written material, the fact that some person might, with extra sensitive perception, understand such a meaning cannot compel this court to establish liability at so low a threshold."). The Ninth Circuit's rule sets the bar too low for challenges to language susceptible of multiple meanings or editorial juxtapositions of language because it tells editors to not engage in truthful speech because of a difficult-to-quantify risk that an alternative, possible secondary meaning might be believed by some reader somewhere.

B. The Ninth Circuit's "Reasonably Possible" Rule When Applied To A False Light Claim Conflicts With Standards Imposed By This Court And Courts Outside The Ninth Circuit.

The failure of the "reasonably possible" rule to acknowledge and provide protection for reasonable truthful meanings conveyed in these situations violates this Court's longstanding reluctance to punish the publication of truthful speech. "'[S]tate action to punish the publication of truthful information seldom can satisfy constitutional standards.'" *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2000). "Moreover, 'our decisions establish that absent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech.'" *Bartnicki*, 532 U.S. at 534 n.21. Yet it is this line that the Ninth Circuit's rule crosses.

The rule also conflicts with approaches developed outside the Circuit, leading to the danger that a national publisher will have to design its editorial practices to meet with the more restrictive speech requirements in the

Ninth Circuit or face potential liability. The Illinois Supreme Court, for example, has adopted an "innocent construction" rule that is the reverse of the Ninth Circuit's "reasonably possible" rule, stating that speech is *per se* protected if, taken in context, it is reasonably capable of a non-defamatory or non-offensive meaning. *See Chapski v. The Copley Press*, 442 N.E.2d 195 (Ill. 1982); *Pope v. The Chronicle Publishing Co.*, 95 F.3d 607 (7th Cir. 1996).

C. A More Nuanced Standard Would Properly Ensure Sufficient Protection Of Speech.

While the "reasonably possible" standard may remain appropriate in actions based on the falsity of individual statements, the First Amendment requires a more restrictive standard where courts inquire into whether a false message is sent by ambiguous juxtaposition of multiple elements that could be susceptible of multiple meanings. The notion that a State's definition of a tort cannot undermine the requirements of the First Amendment was made clear by this Court in *New York Times*, 376 U.S. at 262, 279-289, and accepted by the California Supreme Court in *Blatty v. New York Times Co.*, 728 P.2d 1177, 1183-84 (Cal. 1986).

One alternative would be the following: If a statement or juxtaposition of elements on a page may reasonably be innocently interpreted or viewed as referring to someone other than the plaintiff when considered in context, with the words and the implications therefrom given their natural and obvious meaning, the plaintiff should be required to show some form of special damages/pecuniary injury in order to proceed to trial. Requiring evidence of special damages/pecuniary injury would provide a "reality check" – independent proof that the false, defamatory message was the one believed by readers – and would limit actionable cases to the more extreme, obvious scenarios,

providing a better guideline for editors.[7] This would limit the insertion of the courts into the editorial process. It would also better protect speech with multiple meanings from attack by a plaintiff who may seek to litigate based on overly fragile sensibilities or a desire to censor speech about him of which he does not approve and from juries who may punish it because it is unpopular or published in an unpopular context.[8]

II. THE NINTH CIRCUIT IGNORED ITS INDEPENDENT REVIEW OBLIGATION

The standard of review on summary judgment is *de novo*, or independent, review. In a case involving speech, moreover, the First Amendment imposes an obligation on reviewing courts to make an "independent examination of the whole record . . . so as to assure [them]selves that the judgment does not constitute a forbidden intrusion on the field of expression." *New York Times*, 376 U.S. at 285; *see also Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287,

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[7] This notion is not foreign in the law. Justice Brennan's dissent in *Time, Inc. v. Firestone*, 424 U.S. 448, 475 n.3 (1976) (Brennan, J., dissenting), argued that permitting a defamation plaintiff to recover on a showing of only emotional distress with no proof of pecuniary injury would abrogate the use of summary judgment procedures in defamation litigation and invite jury punishment of unpopular speech. *See also Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 695 (9th Cir. 1998) (applying a California statue providing that defamatory language that is not libelous on its face is not actionable unless the plaintiff proves he has suffered pecuniary injury).

[8] The proposed rule also is consistent with founding principles. One commentator connects the innocent construction doctrine to the Founders' drafting of the First Amendment, through the pens of English journalists John Trenchard and William Gordon, who wrote under the pseudonym Cato and whose concepts and rhetoric were actively advanced by the Founders. *See* Anderson, *The Origins of The Press Clause*, 30 UCLA L. REV. 455, 525 (1983).

1293 (D.C. Cir. 1988); *Herbert v. Lando*, 781 F.2d 298, 308 (2d Cir. 1986); *Newton v. NBC, Inc.*, 930 F.2d 662, 670 (9th Cir. 1990).

The Ninth Circuit failed to perform such a review. It neglected to conduct any examination at all of one of the essential elements of the false light tort, thereby mandating a reversal of its ruling on that claim. The Court listed the four elements that Solano bears the burden of proving: (1) Playgirl disclosed to one or more persons information about or concerning Solano that was presented as factual but that was actually false or created a false impression about him; (2) the information was understood by the persons to whom it was disclosed as stating or implying something highly offensive that would have a tendency to injure Solano's reputation; (3) by clear and convincing evidence, Playgirl acted with constitutional malice; and (4) Solano was damaged by the disclosure. App. 4a. The Court concluded that Solano "provided sufficient evidence to create triable issues of fact for the jury on the elements of each of his causes of action" (App. 2a), but failed to even address the second element ("*the information was understood by the persons to whom it was disclosed* as stating or implying something highly offensive that would have a tendency to injure Solano's reputation") whatsoever and failed to identify any evidence provided by Solano as to whether any reader of the magazine *actually understood* Playgirl's cover to send a false message about him.

In order to prevail, Solano must present *some* evidence on every required element "from which a jury might return a verdict in his favor." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). The standard he must meet in order to prevail is that the cover and article, "read and construed in the sense in which *the readers to whom it is addressed* would ordinarily understand it," sent a highly offensive false message. *Washington Post Co. v.*

Chaloner, 250 U.S. 290, 293 (1919) (emphasis added). Even the "declarations of a few people [who misunderstood the publication] do[ ] not raise a question of fact as to the view of the average reader." *San Francisco Bay Guardian v. Superior Court*, 21 Cal. Rptr. 2d 464, 467 (Ct. App. 1993). Here, however, Solano did not provide even a single declaration. As a result, had the Ninth Circuit properly conducted a *de novo* review, it could not have allowed the false light claim to proceed.

The Court also failed to independently review the deposition testimony, parroting Solano's misleading characterizations of it, which took statements out of their chronological and substantive context. As an example, in support of its actual malice finding, the Court cited Ms. Spiezio's testimony as though it referred to her contemporary understanding of the word "exposed" in the banner line. App. 13a. The briefest review of the testimony, however, indicates that Ms. Spiezio was responding to a question about how she interpreted the cover line *on the day of her deposition*. App. 6g. The error is determinative because a court's assessment of malice must measure an editor's knowledge *at the time of publication*, not an understanding arrived at after the fact. *See New York Times*, 376 U.S. at 286. The court made similar errors regarding Ms. O'Rourke's testimony. The testimony itself is not disputed, even if its value and import may be, and the Court was obligated to make its own review of it.

III. THE NINTH CIRCUIT'S OPINION CONTRAVENES *ANDERSON V. LIBERTY LOBBY, INC.* BY CONVERTING THE "CLEAR AND CONVINCING" ACTUAL MALICE STANDARD INTO A MERE PREPONDERANCE STANDARD

In *Anderson v. Liberty Lobby, Inc*, this Court held that a public figure libel plaintiff cannot survive a summary

judgment motion if the evidence in opposition "is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence." 477 U.S. at 254. "Clear and convincing" is a significantly heightened standard that reflects a societal judgment about the great importance of particular types of speech. *See Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 283 (1990); *Eastwood v. Nat'l Enquirer, Inc.*, 123 F.3d 1249, 1252 (9th Cir. 1997) (proving actual malice by clear and convincing evidence is a heavy burden, "far in excess of the preponderance sufficient for most civil litigation").

The Ninth Circuit, while it mentioned the "clear and convincing" standard at the outset of its analysis (App. 10a), ultimately found sufficient evidence of actual malice merely by showing a "conflict" in the evidence (App. 16a). In so doing, it effectively converted the "clear and convincing" standard into a mere *preponderance* standard.

The Court's failure to properly perform this analysis is significant because two of the three pieces of evidence it considered were plainly circumstantial: testimony suggesting a continuing effort to "sex up" *Playgirl* to promote sales, but with no particular reference to the January 1999 issue; and "the typical Playgirl content." App. 14a. This Court in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667-68 (1989), cautioned that "courts must be careful not to place too much reliance" on circumstantial evidence of actual malice. The Ninth Circuit's remaining finding supporting malice – that two final decisionmakers "were aware of some staffers' concerns that the cover might falsely imply that Solano appeared nude inside the magazine" – is supported solely by the internally contradictory and speculative testimony of former associate editor Theresa O'Rourke (App. 7g-8g), to which the Court gave far more meaning than it was capable. The rule that on summary judgment review

evidence must be viewed "in the light most favorable to the nonmoving party" does not warrant giving evidence more significance than it can bear. *See, e.g.*, *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520-21 (1991) (courts are required to draw only "justifiable" inferences). Had the Court performed the proper assessment it would have been forced to conclude that this evidence simply was not of sufficient "caliber" and "quality" to meet the required significantly heightened standard.

IV. THE NINTH CIRCUIT IMPERMISSIBLY BURDENED SPEECH BY APPLYING AN OVERLY BROAD MALICE FORMULATION THAT UNDULY LIMITS THE SCOPE OF THE FIRST AMENDMENT DEFENSES TO CALIFORNIA'S MISAPPROPRIATION TORTS

The Ninth Circuit unduly limited the First Amendment-based defenses to California's misappropriation of publicity causes of action when it misapplied the limited holding of *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 347 (Ct. App. 1983), permitting this case to proceed to trial based on its previous determination in connection with the false light claim that "Solano has established a genuine issue regarding whether Playgirl acted with actual malice in using Solano's photograph on the cover of the magazine." App. 20a. The misapplication improperly expands and converts a narrowly-drawn statute and common-law cause of action focused on an "economic" or "merchandising" right (*see Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001)) into tools that now can broadly punish *any* false speech whatsoever. This has never properly been the goal of a claim based on the right of publicity. Such an expansion risks engulfing the law of defamation and giving public figures enormous latitude to censor speech about themselves.

A. The Limited Holding Of The California Court Of Appeals In *Eastwood*.

CALIFORNIA CIVIL CODE § 3344 provides a claim for use of another's name, voice, or likeness on or in products, merchandise, or goods without consent. Section 3344(d) provides a defense that broadly protects expressive speech by denying liability when the use is in connection with a "news" or "public affairs" account. The common-law version of the tort is very similar. A plaintiff must show (1) a defendant's use of plaintiff's identity; (2) to that defendant's advantage; (3) lack of consent; and (4) resulting injury. *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 413-14 (9th Cir. 1996); *Eastwood*, 198 Cal. Rptr. at 346. The claim is likewise defeated as a matter of First Amendment law by proof that the use is newsworthy or of "public interest." *See Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d 790, 794-95 (Ct. App. 1993).

The California Court of Appeals in *Eastwood*, referring to the "actual malice" test set forth in *New York Times*, 376 U.S. at 279-80, held that the Section 3344 "news and public affairs" defense would not provide an exemption from liability for a "knowing or reckless falsehood." *Eastwood*, 198 Cal. Rptr. at 352. Two important facts, however, limit the application of that ruling. First, the *Eastwood* court's ruling is limited by the nature of its facts. The court ruled at the demurrer stage that the complaint alleged a misappropriation claim only where Eastwood alleged that the article inside the *National Enquirer* about him was created out of whole cloth and was "*entirely* false." *Id.* at 350-52 ("[W]e are quite sure that the First Amendment does not immunize Enquirer when the *entire* article is allegedly false.") (emphasis added). Second, when *Eastwood* was decided, Section 3344 applied only to unauthorized uses "for purposes of advertising products, merchandise, goods or services, or for

purposes of solicitation of products. . . . " Later, the statute was amended to eliminate the requirement that the misappropriation must occur in an advertisement, endorsement, or solicitation. *See KNB Enter. v. Matthews*, 92 Cal. Rptr. 2d 713, 717 n.5 (Ct. App. 2000).

Taken together, these two facts establish that the *Eastwood* court effectively found that the wholesale manufacture of the story left *no other purpose for the use of the photograph and name* but the very advertising purpose prohibited by the statute. In fact, the same court that decided *Eastwood* later clarified in *Maheu v. CBS, Inc.*, 247 Cal. Rptr. 304 (Ct. App. 1988), that "[h]ad the article [in *Eastwood*] not been alleged to be *entirely* false, it would have come within the exemption set forth in Civil Code Section 3344, subdivision (d) for news accounts." *Id.* at 312 (emphasis added).

B. The Ninth Circuit's Broad Articulation Of The Limited *Eastwood* Holding Invites Misuse Of A Misappropriation Claim To Censor Speech.

Because the *Eastwood* ruling was so limited by its context, the Ninth Circuit erred in relying on it for the broad proposition that *any* "knowing or reckless falsehood" defeats the First Amendment newsworthiness defense. The Ninth Circuit's broad characterization creates a loophole that would enable plaintiffs to use the misappropriation claim, rather than the more appropriately focused defamation and false light torts, to punish speech. Those torts raise higher barriers to recovery than simple knowing or reckless falsehood – actionable speech must be knowingly or recklessly false *and* be offensive or injurious to reputation. The "offensive/defamatory" requirements properly limit the scope of recovery to the most extreme

circumstances, minimizing the torts' impact on the free flow of speech so valued by the First Amendment.

Because no similar limitation exists in misappropriation claims, the Ninth Circuit's error poses the threat of the misappropriation tort "swallowing up and engulfing the whole law of public defamation," rendering meaningless hundreds of years of common-law development of that action. *See* W. Prosser, *Privacy*, 48 CAL. L. REV. 383, 401 (1960), *cited in Flynn v. Higham*, 197 Cal. Rptr. 145, 148 (Ct. App. 1983). It makes little doctrinal sense to regulate false speech using claims aimed at compensating injury to an "economic" or "merchandising" right, the *prima facie* elements of which do not even use the word "false."[9]

Avoiding this risk requires narrow application of the misappropriation tort to achieve only its narrowly defined purpose of compensating injuries to an "economic" or "merchandising" right. Treating publications as "merchandise" carries substantial risks of censorship, as many courts have found. *See Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 462 (Cal. 1979) (citing concern that

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[9] The California Supreme Court recently compared the right of publicity to a property right and held that "[w]hat the right of publicity holder possesses is not a right of censorship, but a right to prevent others from misappropriating the economic value generated by the celebrity's fame through the merchandising of the 'name, voice, signature, photograph or likeness' of the celebrity." *Comedy III Productions*, 21 P.3d at 807. The overwhelming majority of cases decided under the tort in California have involved the use of a celebrity's name or image on an item of merchandise, or to market or imply endorsement of a product, such as in an advertisement. *See, e.g., Downing v. Abercrombie and Fitch*, 265 F.3d 994 (9th Cir. 2001) (photograph in a catalog); *Comedy III Productions*, 21 P.3d at 800-01 (Three Stooges portrait on T-shirts); *Abdul-Jabbar*, 85 F.3d at 407 (name used in car ad); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (sound-alike voice used in food ad); *Fairfield v. Am. Photocopy Equip. Co.*, 291 P.2d 194 (Cal. Ct. App. 1955) (name used in photocopier ad).

"reports and commentaries on the thoughts and conduct of public and prominent persons [may] be subject to censorship under the guise of preventing the dissipation of the publicity value of a person's identity."); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 574 n.11 (1977).

As a result, the First Amendment must require that liability not accrue for speech that would otherwise be protected by the First Amendment absent a false message made with actual malice that *wholly* transforms the "newsworthy" expressive speech into mere "merchandise" with no expressive value. The Ninth Circuit, having made no such finding, erred and should not have permitted the misappropriation claims to proceed to trial.

CONCLUSION

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

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September 11, 2002

APPENDIX

A The opinion of the United States Court of Appeals for the Ninth Circuit that gives rise to this petition. *Solano v. Playgirl, Inc.*, 292 F.3d 1078 (9th Cir. 2002). 1a

B The District Court opinion that gave rise to the Ninth Circuit's opinion (ORDER GRANTING DEFENDANT PLAYGIRL, INC.'S MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFF ON ALL CLAIMS), unpublished, filed on February 12, 2001, and entered on February 13, 2001 [*Ninth Circuit APPELLANT'S EXCERPTS OF RECORD ("ER") 1165-97*] 1b

C The District Court's findings supporting its summary judgment opinion (FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTING THE COURT'S FEBRUARY 12, 2001 ORDER GRANTING DEFENDANT PLAYGIRL, INC.'S MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFF ON ALL CLAIMS), unpublished and filed on February 27, 2001 [*Ninth Circuit APPELLANT'S ER 1271-1305*] 1c

D A copy of the cover of the January 1999 issue of *Playgirl* magazine that depicted and referred to Respondent (also attached as Addendum A to the Ninth Circuit's opinion, Appendix A hereto) [*Ninth Circuit APPELLANT'S ER 91*] 1d

E A copy of the article inside the January 1999 issue of *Playgirl* magazine that depicted and referred to Respondent [*Ninth Circuit APPELLANT'S ER 103-05*] 1e

F Portions of the Print Order for the January 1999 issue of *Playgirl* magazine. [*Ninth Circuit APPELLANT'S ER 168-73*] 1f

APPENDIX – Continued

G Excerpts of deposition testimony submitted in support of Playgirl's MOTION FOR SUMMARY JUDGMENT [*Ninth Circuit APPELLANT'S ER 266-67, 300-02, 304-05, 687-88, 597, 606, 1081-82*] 1g

H Excerpts from a transcript of Solano's January 1999 interview on the television show *Donny & Marie* hosted by Donny Osmond and Marie Osmond [*Ninth Circuit APPELLEE'S SUPPLEMENTAL ER 1346-48*] 1h

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE SOLANO, JR, *Plaintiff-Appellant*, v. PLAYGRIL, INC., *Defendant-Appellee*.	No. 01-55443 D.C. No. CV-00-01242-DT OPINION

Appeal from the United States District Court
Central District of California
Dickran M. Tevrizian, District Judge, Presiding

Argued and Submitted
March 4, 2002 – Pasadena, California

Filed June 13, 2002

Before: Harry Pregerson, Raymond C. Fisher and Richard C. Tallman, Circuit Judges.

Opinion by Judge Fisher

COUNSEL

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OPINION

FISHER, Circuit Judge:

The January 1999 issue of Playgirl magazine featured a cover photograph of actor Jose Solano, Jr., best known for his role as "Manny Gutierrez" on the syndicated television program "Baywatch" from 1996 to 1999. Solano was shown shirtless and wearing his red lifeguard trunks, the uniform of his "Baywatch" character, under a heading reading: "TV Guys. PRIMETIME'S SEXY YOUNG STARS EXPOSED." Playgirl, ostensibly focused on a female readership, typically contains nude photographs of men in various poses emphasizing their genitalia, including some showing them engaged in simulated sex acts. The magazine also contains written editorial features. Although Solano – who did not pose for or give an interview to Playgirl – did not in fact appear nude in the magazine, he sued Playgirl alleging it deliberately created the false impression that he did so, making it appear he was willing to degrade himself and endorse such a magazine.

The district court granted Playgirl summary judgment, finding Solano had failed to establish that Playgirl created a false impression about what readers would actually see of Solano inside the magazine or in any event that it had acted knowingly or recklessly in doing so. We disagree and reverse for a trial. At this stage of the proceedings, viewing the evidence most favorably to Solano as we must on summary judgment, we hold that he provided sufficient evidence to create triable issues of fact for the jury on the elements of each of his causes of action.

FACTS AND PROCEDURAL HISTORY

Because this case concerns the magazine cover, we describe it in some detail and append a copy of it to this opinion. (Addendum A.) As indicated above, Solano appeared bare-chested wearing his red trunks, dominating the cover. In the upper left corner was a red circle containing the words, "TV Guys," followed by the headline, "Primetime's Sexy Young Stars Exposed," which ran across the top of Solano's head. Immediately to the left of Solano's picture, the magazine proclaimed, "12 Sizzling Centerfolds Ready to Score With You." The "s" in "Centerfolds" was superimposed on Solano's right shoulder. Also placed to the left of Solano, running down the left margin, the cover touted "Countdown to Climax: Naughty Ways to Ring in the New Year," "Toyz in the Hood: The Best in Erotic Home Shopping" and "Bottoms Up!: Hot Celebrity Buns." In the cover's lower right hand corner was the headline, "Baywatch's Best Body, Jose Solano."

Solano's sole appearance inside the magazine was on page 21, in a quarter-page, head-and-shoulders photograph – showing him fully dressed in a tee shirt and sweater – alongside a brief, quarter-page profile of the actor. Solano's profile included information about his "Baywatch" character, facts about his life before he began acting and a quote in which he says that with two younger brothers he strives to be a positive role model and hopes to encourage others to pursue their dreams. Solano's photograph and profile were part of a five-page feature entitled "TV Guys," consisting of photographs and short profiles of 10 popular television actors. Neither Solano nor any of the other actors was shown nude. Significantly, Playgirl issues are displayed on newsstands packaged in plastic wrap to

prevent potential customers from flipping through the pages to view the magazine's contents.

This action began when Solano filed suit against the magazine's publisher, Playgirl, Inc., in California Superior Court, alleging Playgirl invaded his privacy by portraying him in a false light and by misappropriating his likeness in violation of California Civil Code § 3344 and common law. He claimed he was humiliated and embarrassed when he learned of the use of his photograph on the cover of Playgirl and that he suffered a decline in job offers, invitations to charity events and social contacts with others in the entertainment industry following the publication of the January 1999 issue.[1] After Playgirl removed the case to federal court, the district court granted Playgirl's motion for summary judgment. The court found that the use of Solano's photograph in Playgirl did not create a false impression and, in any event, as a public figure he could not show actual malice; that the public affairs exception defeated his § 3344 claim; and that the public interest exception defeated his common law misappropriation of likeness claim. The court also awarded attorney's fees and costs to Playgirl. Solano timely appealed.

We review a grant of summary judgment de novo. *Weiner v. San Diego County,* 210 F.3d 1025, 1028 (9th Cir. 2000). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether any genuine issues of material fact exist and whether the

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[1] As recently as January 2001, Playgirl continued to sell the January 1999 issue as a back issue for order from the magazine.

district court applied the relevant substantive law. *Lopez v. Smith,* 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc).

DISCUSSION

I. The False Light Claim

Solano argues that Playgirl's use of his photograph along with suggestive headlines on the cover conveyed the false message that Solano voluntarily posed nude for the magazine and, in doing so, implicitly endorsed the magazine and its sexually explicit content. To prevail on this false light claim, Solano must show that: (1) Playgirl disclosed to one or more persons information about or concerning Solano that was presented as factual but that was actually false or created a false impression about him; (2) the information was understood by one or more persons to whom it was disclosed as stating or implying something highly offensive that would have a tendency to injure Solano's reputation; (3) by clear and convincing evidence, Playgirl acted with constitutional malice; and (4) Solano was damaged by the disclosure. *See Fellows v. Nat'l Enquirer, Inc.,* 721 P.2d 97, 99-101 (Cal. 1986); *Aisenson v. Am. Broad. Co., Inc.,* 269 Cal. Rptr. 379, 387 (Ct. App. 1990); *see also* Restatement (Second) of Torts § 652E (1976) (discussing elements of false light claim).

A. False Impression and Injury to Reputation

Solano contends that when the photograph and headlines on the cover are viewed in context – that of a magazine that features sexually suggestive nude pictures of men – there is a triable issue of fact regarding the falsity of the message conveyed by Playgirl. We agree. We addressed a publication's creating an implied false message

in *Eastwood v. Nat'l Enquirer, Inc.*, 123 F.3d 1249 (9th Cir. 1997), and *Kaelin v. Globe Communications Corp.*, 162 F.3d 1036 (9th Cir. 1998). In *Eastwood* the tabloid magazine National Enquirer's cover page headline advertised an "Exclusive Interview" with actor/director Clint Eastwood. The magazine contained an article with quotes allegedly attributable to Eastwood, cast as if Eastwood had been speaking directly to the bylined Enquirer editor. *See Eastwood,* 123 F.3d at 1250. Eastwood in fact had never given any interview to the Enquirer – exclusive or otherwise. Although the magazine never expressly stated that Eastwood actually had given it the interview, this court nevertheless reasoned that the Enquirer had "signal[ed], through text and graphics, that he had willingly talked to the Enquirer." *Id.* at 1255. *Kaelin* involved a defamation action brought by Kato Kaelin, the hapless houseguest of O.J. Simpson, against the Globe tabloid for publishing a front-page headline announcing, "COPS THINK KATO DID IT . . . he fears they want him for perjury, say pals." Kaelin argued the "IT" implied the two brutal murders for which Simpson was tried and acquitted; the magazine claimed the word referred only to perjury, because the article inside the magazine explained that the police suspected Kaelin of having committed perjury. We were unpersuaded by the Globe's argument: "Even assuming that such a [perjury] reading is reasonably possible, it is not the only reading that is reasonably possible as a matter of law. So long as the publication is reasonably susceptible of a defamatory meaning, a factual question for the jury exists." *Kaelin,* 162 F.3d at 1040.[2]

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[2] Although *Kaelin* involved defamation rather than false light, it nonetheless is applicable in this context. "An action for invasion of

(Continued on following page)

Playgirl's reliance on *Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527 (9th Cir. 1984), is misplaced. In *Brewer,* the plaintiff brought suit when Hustler magazine reproduced a portion of a previously published postcard depicting Brewer shooting himself in the head. Brewer himself had created the postcard and contracted to sell it commercially. We rejected Brewer's argument that his right to privacy was violated by publication of the photograph in a sexually explicit magazine, holding that "[t]his argument is without merit because Brewer had no right to choose the forum in which his photograph was displayed." *Id.* at 530. Similarly, Solano cannot prevail on his false light claim simply by arguing that Playgirl put him on the cover of a magazine that contains explicit content. Indeed, that was the basis of Brewer's claim – that a reproduction of a portion of his *nonsexual* postcard appeared *inside* a sexually explicit magazine.

Unlike *Brewer,* Solano's claim goes much deeper. Solano contends that his bare-chested, three-quarter-length photograph alongside the suggestive headlines on the Playgirl cover created the false impression that readers could expect to find more photographs of him inside the magazine, nude – "exposed" – in Playgirl's typical sexually explicit and revealing mode of depicting its "sexy" male subjects. Moreover, the placement of the "12 Sizzling Centerfolds – Ready to Score With You" line, which appeared in large bold letters immediately to the left of and just touching Solano's shoulder, could reasonably be

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privacy by placing the plaintiff in a false light in the public eye is in substance equivalent to a libel claim." *Selleck v. Globe Int'l,* 212 Cal. Rptr. 838, 845 (Ct. App. 1985) (citation omitted).

interpreted to encompass Playgirl's cover subject, Solano. It is well-established that "[a] defendant is liable for what is insinuated as well as for what is stated explicitly." *O'Connor v. McGraw-Hill,* 206 Cal. Rptr. 33, 36 (Ct. App. 1984) (quotation omitted). It is Playgirl's insinuation about what readers would see of Solano inside the magazine that distinguishes this case from *Brewer.* As the Seventh Circuit observed in *Douglass v. Hustler Magazine,* 769 F.2d 1128 (7th Cir. 1985), where an actress asserted a false light claim based on Hustler magazine's insinuation that she was the kind of person to pose nude for Hustler: "To be depicted as *voluntarily* associated with such a sheet . . . is unquestionably degrading to a normal person. . . . " *Id.* at 1136.

That Solano's profile inside the magazine was of a relatively innocent and nonsexual nature is of little significance.[3] In *Kaelin,* we concluded that the accuracy and truth of the Globe article discussing the suspicion that Kaelin had perjured himself did not cure the false impression conveyed by the cover headline, which implied he was suspected of murder. 162 F.3d at 1041. We held that the issue was one for the jury to decide: "A reasonable juror could conclude that the Kaelin article was too far removed [17 pages away] from the cover headline to have the salutary effect that Globe claims." *Id.* Here, the Solano profile appeared 21 pages away from the cover – with plenty of graphic frontal male nudity to traverse before

[3] Solano's profile included some mild titillating prose: "luscious Latino"; "Jose didn't always spend his days frolicking on the beach with fake-boobed babes"; and "versatile stud."

reaching "TV Guys" and Solano's tame profile.[4] "[O]ur inquiry is not to determine whether the publication may have an innocent meaning but rather to determine if it reasonably conveys a defamatory meaning. In making that determination we look to what is explicitly stated as well as what insinuation and implication can reasonably be drawn from the publication." *Selleck v. Globe Int'l,* 212 Cal. Rptr. 838, 843 (1985) (citation omitted). Given the record before us – especially when we recall that the magazine is displayed for sale in plastic wrapping, making the cover the key to what a reader can expect to find inside the magazine – a jury reasonably could reach a conclusion similar to that arrived at by this court in *Eastwood:*

> [W]e look to the totality of the Enquirer's presentation of the interview and find that the editors falsely suggested to the ordinary reader of their publication – as well as those who merely glance at the headlines while waiting at the supermarket checkout counter – that Eastwood had willingly chatted with someone from the *Enquirer.*

123 F.3d at 1256. There we concluded that the false impression that Eastwood had actually given an interview with the Enquirer could convey the message that he was "washed up as a movie star if he was courting publicity in a sensationalist tabloid." *Id.* Similarly, a jury reasonably could conclude that the Playgirl cover conveyed the message that Solano was not the wholesome person he claimed to be, that he was willing to – or was "washed up" and had to – sell himself naked to a women's sex magazine.

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[4] The terrain is even more extensive and graphic for those who read their magazines back to front.

B. Actual Malice

Although Solano has established a genuine issue as to whether the cover created a false impression, to survive summary judgment he must, as a public figure, also establish by clear and convincing evidence that Playgirl's editors knowingly or recklessly created this false impression. The third element necessary to establish a claim for false light, therefore, is the constitutional requirement of actual malice. *See Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 686 (1989) (quoting *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 511 (1984)); *Aisenson,* 269 Cal. Rptr. at 382-83. A failure to set forth specific facts showing such malice is a proper ground for summary judgment. *See Dworkin v. Hustler Magazine, Inc.,* 867 F.2d 1188, 1195 (9th Cir. 1989). Specifically, Solano must show that Playgirl "either deliberately cast [its] statements in an equivocal fashion in the hope of insinuating a [false] import to the reader, or that [it] knew or acted in reckless disregard of whether [its] words would be interpreted by the average reader as [false] statements of fact." *Good Gov't Group of Seal Beach, Inc. v. Superior Court,* 586 P.2d 572, 578 (1978). As we noted in *Eastwood,* proving actual malice by clear and convincing evidence is a heavy burden, "far in excess of the preponderance sufficient for most civil litigation." 123 F.3d at 1252. In *Harte-Hanks,* the Supreme Court explained the actual malice standard:

> [T]he actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term. . . . Nor can the fact that the defendant published the defamatory material in order to increase its profits suffice to prove actual malice. . . . Actual malice, instead, requires at a minimum that the statements were

> made with a reckless disregard for the truth. And although the concept of 'reckless disregard' 'cannot be fully encompassed in one infallible definition,' we have made clear that the defendant must have made the false publication with a 'high degree of awareness of . . . probable falsity,' or must have 'entertained serious doubts as to the truth of his publication.'

491 U.S. at 666-67 (citations and footnote omitted). Similarly, the California Court of Appeal has emphasized:

> '[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.'

Aisenson, 269 Cal. Rptr. at 386 (citation omitted).

"The subjective determination of whether [the defendant] in fact entertained serious doubts as to the truth of the statement may be proved by inference, as it would be rare for a defendant to admit such doubts. A court typically will infer actual malice from objective facts. These facts should provide evidence of negligence, motive, and intent such that an accumulation of the evidence and appropriate inferences supports the existence of actual malice." *Bose Corp. v. Consumers Union,* 692 F.2d 189, 196 (1st Cir. 1982) (citations omitted).

Against this backdrop, we now turn to the conflicting evidence regarding the existence of actual malice on the part of Playgirl editors in assembling the January 1999

issue. Playgirl associate editor Theresa O'Rourke testified in her deposition that at an October 1998 meeting to discuss the January 1999 cover, Playgirl senior vice president Carmine Bellucci generally instructed the editorial staff to "sex up" the magazine to imply that there was more nudity in the magazine than actually was there.[5] She stated that Bellucci wanted to "bang [readers] over the head with something like, hey, this is sexy young stars exposed" so that "people are going to want to pick up the magazine more." According to O'Rourke, "we definitely weren't trying to be subtle, and we knew it." She stated that there had been discussion in the cover meetings that the cover layout implied Solano appeared nude in a centerfold inside the magazine. She said the "Primetime's Sexy Young Stars Exposed" headline specifically sparked debate at the meetings "[b]ecause some of us did not feel like it was fair to do that." Editor-in-chief Claire Viguerie Harth testified that the magazine's intent with the headline was "to make a line that was sexy enough [that] people would be intrigued and want to look inside, but not to say something that the magazine was showing something that it didn't have."

Playgirl art director Joanne Chiaramonte emphasized that if the magazine had contained a nude photograph of Solano, the cover explicitly would have said so. She stated that she never thought readers would expect to see Solano in a centerfold photograph because the headline, "Baywatch's

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[5] Playgirl claims that O'Rourke was a low-level editor without any decision-making authority. We note, however, that O'Rourke appears third from the top, under only the editor-in-chief and managing editor, in the masthead for the January 1999 issue.

Best Body, Jose Solano" clearly referred to Solano's presence in the magazine. *But see Eastwood,* 123 F.3d at 1256 (concluding that readers would not understand that only "*Enquirer* Interview," not "Exclusive Interview," would mean interview was given directly to Enquirer). Additionally, she explained that "[e]xposed and nude are really two different things." Associate art director Serena Spiezio disagreed.[6] She testified that she thought it would be reasonable for a reader to expect to see Solano nude inside the magazine "[b]ecause it says TV Guys and they're being exposed. And it's Playgirl Magazine. What else would they be exposing but their bodies?"

O'Rourke also recalled that someone raised a concern about the "12 Sizzling Centerfolds: Ready to Score with You" headline because it occupied the space where the headline relating to the cover subject often is placed. She believed "someone's going to think that he's naked in there." O'Rourke said that Bellucci tended to just "blow off" such comments and concerns. Bellucci agreed in his deposition that Solano was a "primetime sexy young star" as those words were used in the cover headline, but denied that the editors used Solano's photograph and the cover headlines falsely to imply that Solano appeared nude in the magazine.

Even if, as Playgirl asserts, Chiaramonte and Bellucci were the final decisionmakers as to the content of the cover, the testimony of O'Rourke and Spiezio serve to prove that during the editorial process *someone* raised

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[6] According to Playgirl, Spiezio worked for the magazine for only three and a half months before she was fired.

concerns about the use of Solano's photograph alongside the suggestive headlines; both Bellucci and Chiaramonte were aware of some staffers' concerns that the cover might falsely imply that Solano appeared nude inside the magazine. Given that awareness and the evidence that Bellucci wanted to "sex up" the magazine to imply nudity, plainly to promote magazine sales, a jury could conclude Playgirl's editors knowingly or recklessly published the misleading cover. Such evidence is sufficient to satisfy the actual malice standard. *See Kaelin,* 162 F.3d at 1042 (holding actual malice inferable from editor's mild concern about ambiguous headline, undisputed absence of belief that Kaelin was a murder suspect and pecuniary motive to sell papers); *Eastwood,* 123 F.3d at 1256 (finding from totality of editors' choices that they intended to convey impression, known to be false, that Eastwood wilfully submitted to interview by Enquirer).

This case is unlike *Hoffman v. Capital Cities/ABC, Inc.,* 255 F.3d 1180 (9th Cir. 2001). There, actor Dustin Hoffman brought a misappropriation claim when a magazine featured Hoffman and other celebrities, many of whom were then deceased, in digitally altered photographs depicting scenes from famous movies. Hoffman objected to the use of an altered still photograph of himself from the movie "Tootsie" in a layout featuring the year's spring fashions. The well-known picture of Hoffman had been altered to show him modeling new designer clothing. We held that the magazine had not acted with malice because "[a]ll but one of the references to the article in the magazine make it clear that digital techniques were used to substitute current fashions for the clothes worn in the original stills. . . . " *Id.* at 1188. Further, we concluded that "[w]hile [the magazine] never explicitly told its readers

that the living actors did not pose for the altered photographs in the article, there is certainly no clear evidence in the magazine that [the magazine] intended to suggest the opposite. . . . " *Id.* Here the evidence suggests Playgirl may have knowingly or recklessly used its cover to mislead readers about Solano's true state of dress in the magazine.

Cher v. Forum Int'l, Ltd., 692 F.2d 634 (9th Cir. 1982), does not assist Playgirl either. There entertainer Cher gave an interview to a freelance reporter with the understanding that it would be used in a specific magazine, Us. Cher later asked Us not to use the story and the reporter then sold the story to Star, a tabloid, and Forum, a pocket-sized magazine, both of which ran the interview as an "exclusive." Cher argued that the publication of the interview and the "exclusive" headlines on the covers created the impression that she voluntarily gave the interviews to, and thereby endorsed, Star and Forum. We granted judgment in favor of Star because its headlines truthfully conveyed the contents of its magazine. *Id.* at 637-38. On the other hand, we affirmed liability as to Forum because it went beyond the "honest exploitation of the fact that it possessed some pictures of Cher and an interview that she had given a writer," instead falsely advertising in a subscription "tear out" that Cher told Forum "things that she 'would never tell Us' " – which, of course, Cher had told Us originally. *Id.* at 639. As we emphasized, "no matter how carefully the editorial staff of Forum may have trod the border between the actionable and the protected, the advertising staff engaged in the kind of knowing falsity that strips away the protection of the First Amendment." *Id.* at 640. Whether that barrier was crossed here is for the jury to decide.

It is neither surprising nor fatal to Solano's case that there is conflicting, circumstantial evidence that Playgirl entertained serious doubt whether the magazine cover would create the false impression that Solano appeared nude inside the magazine. "As we have yet to see a defendant who admits to entertaining serious subjective doubt about the authenticity of an article it published, we must be guided by circumstantial evidence. By examining the editors' actions we try to understand their motives." *Eastwood,* 123 F.3d at 1253. *See Kaelin,* 162 F.3d at 1042 ("The editors' statements of their subjective intention are matters of credibility for a jury."); *cf. Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists,* ___ F.3d ___, 2002 WL 992667, at *7-*9 (9th Cir. May 16, 2002) (en banc) (discussing deference accorded credibility determinations in court's postjudgment independent assessment of actual malice); *Eastwood,* 123 F.3d at 1252 (same). Viewing the evidence in the light most favorable to Solano and taking into account the typical Playgirl content, we believe Solano at this stage of the proceedings raises a genuine issue as to whether Playgirl's editorial staff produced the January 1999 cover knowing, or with reckless disregard for whether, Solano's bare-chested photograph and various suggestive headlines would falsely imply that he voluntarily posed for and appeared nude inside the magazine.

C. Damages

The final element necessary to prove a case for false light is damages. A plaintiff may collect actual damages and general damages for humiliation and mental anguish and suffering. *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 350 (1974). Playgirl argues that Solano cannot prove any

damages. Solano admitted in his deposition that he did not seek therapy or any other type of treatment from any medical professional, although he did seek spiritual counseling from his father, a minister. He testified to both personal and familial humiliation and embarrassment because of the publication of his picture in the magazine. He claimed that several possibilities for appearing on various television programs failed to materialize after the publication of the Playgirl issue, yet he was unable to provide evidence that any lost job was related to his appearance in the magazine. Solano's current and previous agent and previous manager all stated that no one ever has mentioned the Playgirl issue to them – especially in relation to a job for Solano. Solano also argues that his invitations to charity events declined after the publication of the Playgirl issue, but again he admitted that he could only speculate – and had no proof – that there is a connection between the two events.

In *Eastwood,* we rejected the contention that the jury's award of $150,000 was unsupported by a record that detailed Eastwood's extensive efforts to maintain his privacy. 123 F.3d at 1256. There we held that a jury finding that "fans would think him (1) a hypocrite for giving the Enquirer an 'exclusive interview' about his private life (plus access to an 'exclusive' baby picture), and/or (2) essentially washed up as a movie star if he was courting publicity in a sensationalist tabloid . . . would have been sufficiently damaging to Eastwood's reputation to support an award of this magnitude." *Id.* Previously, we concluded that a jury's award of $75,000 in compensatory damages to singer Tom Waits was sufficiently supported where "the jury could have inferred from the evidence that the commercial created a public impression that Waits was

a hypocrite for endorsing Doritos." *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1104 (9th Cir. 1992). Waits had a strict policy against doing commercials and the company produced a commercial using an imitation of Waits' voice. Similarly, comedienne Carol Burnett's testimony of personal and familial humiliation and embarrassment resulting from a false National Enquirer gossip column item which portrayed her as drunk, combined with her public image (which included her endeavors to raise awareness about alcoholism) and the tabloid's sizeable readership, was enough to support a damage award of $50,000. *Burnett v. Nat'l Enquirer, Inc.*, 193 Cal. Rptr. 206, 222 (Ct. App. 1983). In light of this precedent, Solano's testimony regarding his humiliation and embarrassment is sufficient to establish a genuine issue with respect to damages and precludes summary judgment. (We make no predictions about whether this evidence alone will suffice to sustain the damages element at trial.)

II. The Misappropriation Claims

Solano alleges statutory misappropriation of his right of privacy under California Civil Code § 3344 as well as common law commercial misappropriation invasion of privacy. Under § 3344(a), a plaintiff has a cause of action when "any person . . . knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods . . . without such person's prior consent. . . . " The statute also provides protection for certain uses, however, such that "a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a)."

Cal. Civ. Code § 3344(d) (1997). To prove a claim of common law commercial misappropriation of privacy, a plaintiff must establish the defendant's use of plaintiff's identity, the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise, a lack of consent and resulting injury. *See Downing v. Abercrombie & Fitch,* 265 F.3d 994, 1001 (9th Cir. 2001). Similar to the statutory public affairs protection, the common law misappropriation cause of action also recognizes a public interest protection. *See Dora v. Frontline Video, Inc.,* 18 Cal. Rptr. 2d 790, 794-95 (Ct. App. 1993).

The district court found that the public affairs/public interest newsworthiness protections exempted Playgirl from liability for using the photographs of Solano and thereby granted summary judgment for Playgirl on these claims. Even though the exceptions are to be broadly construed, the newsworthiness privileges do not apply where a defendant uses a plaintiff's name and likeness in a knowingly false manner to increase sales of the publication. The First Amendment does not protect knowingly false speech. *New York Times Co. v. Sullivan,* 376 U.S. 254, 279-80 (1964). "[W]e do not believe that the Legislature intended to provide an exemption from liability for a knowing or reckless falsehood under the canopy of 'news.' We therefore hold that Civil Code section 3344, subdivision (d), as it pertains to news, does not provide an exemption for a knowing or reckless falsehood." *Eastwood v. Superior Court,* 198 Cal. Rptr. 342, 352 (Ct. App. 1983).[7] As

[7] When *Eastwood v. Superior Court* was decided in 1983, section 3344 applied only to an unauthorized use "for purposes of advertising products, merchandise, goods or services, or for purposes of solicitation

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discussed above, we believe Solano has established a genuine issue regarding whether Playgirl acted with actual malice in using Solano's photograph on the cover of the magazine. Therefore, it was premature for the district court to address the applicability of the newsworthiness exceptions to Solano's claims, and summary judgment was inappropriate.[8]

Playgirl argues that summary judgment nevertheless was appropriate because Solano cannot prove the elements of lack of consent and damages for his misappropriation causes of action. We think otherwise. There is enough disputed evidence to require a jury resolution. As to consent, Playgirl purchased Solano's cover photograph from Retna, Ltd., a photograph stock house; the sale invoice for the photograph included language stating that Solano had not executed a release for the use of the image. Additionally, Solano testified in his deposition that his

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of products. . . . " A 1984 amendment to section 3344 eliminated the requirement that the misappropriation must occur in a product advertisement, endorsement or solicitation. *See KNB Enter. v. Matthews,* 92 Cal. Rptr. 2d 713, 717 n.5 (Ct. App. 2000) (discussing amendment to section 3344).

[8] We do not accept Solano's argument that Playgirl is not a news magazine and thus cannot contain content that may be deemed newsworthy. "[E]ven 'vulgar' publications are entitled to such guarantees. . . . Courts are, and should be, reluctant to define newsworthiness." *Lerman v. Flynt Distrib. Co., Inc.,* 745 F.2d 123, 138-39 (2d Cir. 1984). "[N]ewsworthiness is not limited to 'news' in the narrow sense of reports of current events. It extends also to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published." *Shulman v. Group W Prod., Inc.,* 955 P.2d 469, 483 (Cal. 1998) (citations and internal quotation marks omitted).

representatives previously had been approached by Playgirl to do a "spread" in the magazine and he had immediately declined the offer. On the other hand, Playgirl argues that Solano voluntarily posed for the photographer to garner free publicity and knew that the photographs would be sold to magazines for publication.

As for damages, the measure of damages available for misappropriation claims includes the economic value of the use of an individual's name and likeness. *See Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575 (1977). Section 3344 specifically provides that a plaintiff may recover "any profits from the unauthorized use" in addition to actual damages or the $750 minimum statutory damage amount and punitive damages. Cal. Civ. Code § 3344(a) (1997). Solano has established genuine issues with respect to both of these elements.

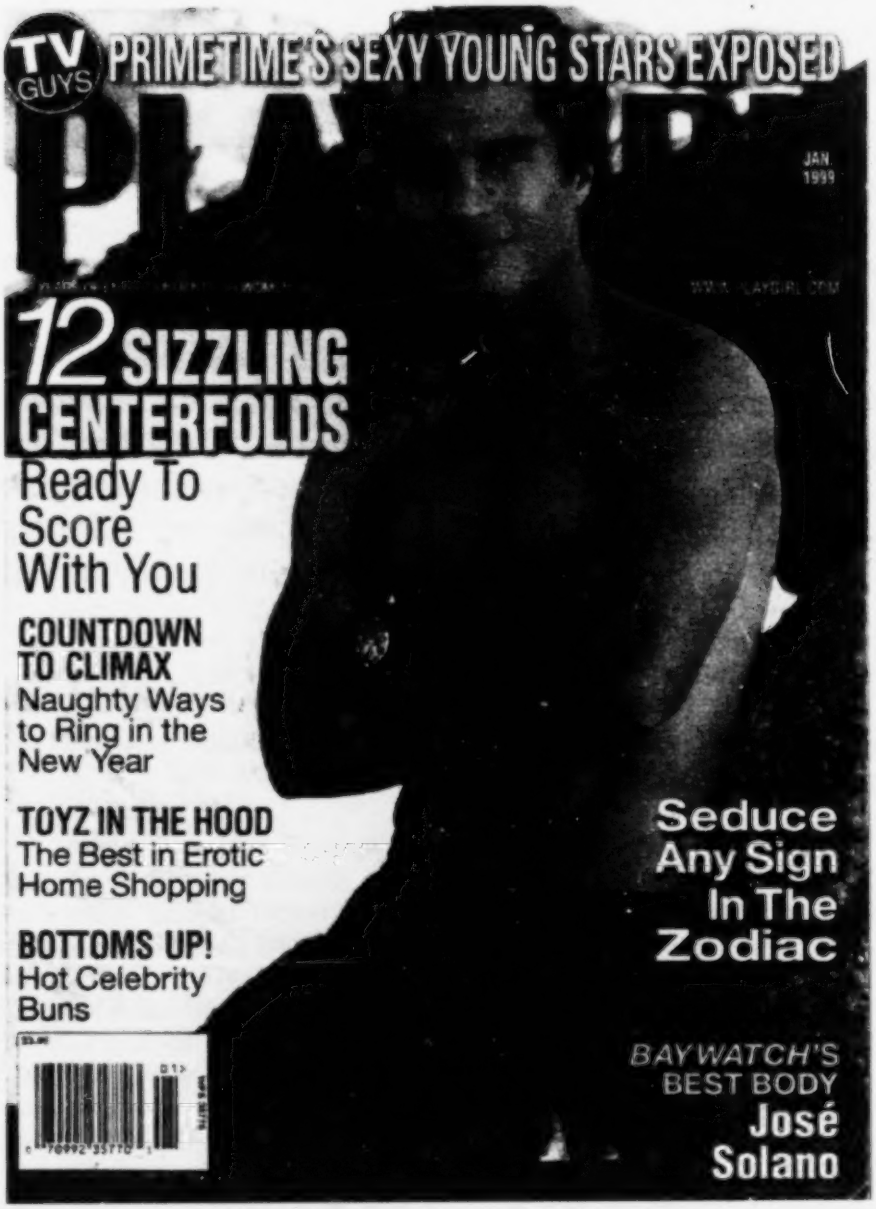
CONCLUSION

For the reasons stated, we reverse the district court's grant of summary judgment to Playgirl and remand for further proceedings.

REVERSED and REMANDED.

01-55443

ADDENDUM A



APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE SOLANO, JR., Plaintiff, vs. PLAYGIRL, INC., and DOES 1 through 25, inclusive, Defendants.	CASE NO. CV 00-1242 DT (Ex) ORDER GRANTING DEFENDANT PLAYGIRL, INC.'S MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFF ON ALL CLAIMS (Filed Feb. 12, 2001)

I. Background

A. Factual Summary

This action is brought by Plaintiff Jose Solano ("Plaintiff") against Defendant Playgirl, Inc. ("Playgirl") for a violation of California Civil Code Section 3344 (misappropriation of likeness); Common Law Invasion of Privacy – Misappropriation of Likeness; and Invasion of Privacy – False Light.

Unless otherwise noted, the following facts are undisputed[1]:

Playgirl publishes Playgirl magazine. Playgirl magazine is a monthly, internationally distributed magazine that has been in continuous publication for more than a

[1] The facts in this section do not constitute the entirety of the undisputed facts. Other undisputed facts are discussed with respect to the claims at issue in the analysis portion of this order.

quarter century. Since at least 1990, every issue of Playgirl magazine has contained nude photos, including a nude "centerfold." Playgirl maintains that while its issues typically contain nude photographs of men, it has always presented significant editorial content aimed at entertaining, informing and educating its female readership.

Plaintiff was a series regular on the Baywatch television show from 1996 to 1999. Plaintiff appeared in 7-8 episodes of Baywatch in the 1996-97 television season, 10 episodes in the 1997-98 television season, and three episodes in the 1998-99 television season. Baywatch reaches 140 countries and is broadcast in 32 languages to a total of more than 1.6 billion people around the world. Plaintiff was the first Latino actor hired as a regular cast member on Baywatch. After two seasons with Baywatch, Plaintiff feared that he would be typecast if he remained on the show, and negotiated his exit. Plaintiff agreed to be featured in just three episodes in the 1998-1999 season – his third season – in which his character would become paralyzed and be written off the show. Plaintiff's last episode was produced in September 1998 and first aired in February 1999. Despite the fact that Plaintiff left the role in 1999, repeat shows on which he appeared are still being broadcast in syndication. Since the end of his tenure on Baywatch, Plaintiff has had roles in film, television and commercials, but has not garnered a recurring role on the regular cast of a television series. When not performing as an actor, Plaintiff devotes a considerable amount of time to charity work. He prides himself on being a positive role model for young people. Plaintiff has never authorized Playgirl to use his name or photograph in any way.

Playgirl used photographs of ten television actors in its January 1999 issue ("January 1999 Issue") to

accompany an article describing the actors, their careers, and something about them. None of the actors featured in the article is nude or in any state of undress. Playgirl neither took nor commissioned the photographs that were used in the article. Playgirl acquired the photographs from photo stock houses, services which keep photographs on file and will sell copies to magazines like Playgirl. The January 1999 Issue contained two photographs of Plaintiff. One is on the cover and depicts Plaintiff in swim trunks with his chest exposed. The other photograph is a head-and-shoulders shot of Plaintiff inside the magazine in a feature entitled "TV Guys." Both of the photographs used of Plaintiff in the January 1999 Issue are true and substantively unaltered. Every part of the profile about Plaintiff that is placed next to his photo inside the magazine is true. The feature shows similar photos of nine other television actors chosen by Playgirl. Each photograph is accompanied by a profile of the pictured actor. The article about Plaintiff highlights Plaintiff's experience as a Desert Storm veteran, a U.S. Navy medic and Junior Olympic soccer champion and set forth his goal "to encourage others to go for their dreams." The article is titled "TV Guys – Primetime's Sexy young stars make for one steamy season." The profile of the featured actors are prefaced by the following paragraph:

> This television season boasts so many small screen sizzlers that there's no hotter place to be each night than couchbound, surfing the tube. With each show's stud even sultrier than the next, you won't want to miss PLAYGIRL's picks for the ultimate lusty lineup.

The title of the magazine, "PLAYGIRL," is stripped in large letters across the top of the magazine and is partly

obscured by the image of Plaintiff's head which overlaps it. The title is accompanied by the tag line: "25 Years of Entertainment For Women." Above the PLAYGIRL title is the cover line: "TV Guys – Primetime's Sexy Young Stars Exposed." Below the PLAYGIRL title and to the left of Plaintiff's photograph is the line: "12 Sizzling Centerfolds Ready to Score With You." In the lower right hand corner of the cover and to the left of Plaintiff's photograph is the line: "Bottoms Up! Hot Celebrity Buns." In the lower right hand corner of the cover and to the right of Plaintiff's photograph is the line: "Baywatch's Best Body Jose Solano."

The scheduled on-sale date for newsstand sales of the January 1999 issue of Playgirl was December 8, 1998. Playgirl's editor in chief at the time also places initial distribution of that issue in early December 1998. Plaintiff first heard of his photograph on the cover of Playgirl in late November – early December of 1998. In January 1999, Plaintiff appeared on the television show Donny & Marie, on which he conveyed a message to the public that he had not appeared nude in Playgirl. Plaintiff has told several television reporters that he did not appear nude in Playgirl. Articles on the lawsuit, containing Plaintiff's denial that he had appeared nude in Playgirl, were published in November 1999 in the Daily News (New York), the Los Angeles Times, the San Antonio Express-News, The Record (New Jersey), in the City News Service (Los Angeles), on the BPI Entertainment News Wire and in the Courthouse News Archive. Plaintiff's refutation also ran on the cable news network CNBC in December 1999.

Plaintiff claims that the overwhelming reaction to his appearance on the cover of Playgirl has been one of shock and disgust, and he states that the embarrassment and

humiliation he has suffered because of Playgirl has been immense. He alleges that he has been shunned by friends and contacts in the entertainment industry.

B. Procedural Summary

On November 24, 1999, Plaintiff filed a Complaint in the Superior Court of the State of California for the County of Los Angeles.

On February 3, 2000, Playgirl filed a Notice of Removal of Action whereby the action was removed to the United States District Court for the Central District of California.

On February 4, 2000, Playgirl filed its Answer.

On May 15, 2000, at the Mandatory Status Conference, this Court set the discovery cut-off date of January 5, 2001, ordered a Pre-Trial Conference to be held on March 5, 2001, and set trial for April 10, 2001.

On May 23, 2000, the Court filed the parties' Stipulation Re Confidential Information.

On July 10, 2000, Plaintiff filed a Request for Judicial Notice of State Court Civil Cover Sheet and Motion for Leave to File a Jury Demand at this Stage.

On July 31, 2000, this Court granted Plaintiff's Motion for Leave to File a Jury Demand. On this same date, Plaintiff filed his jury demand.

On January 22, 2001, Playgirl filed a Motion for Summary Judgment Against Plaintiff on All Claims or, in the Alternative for Summary Adjudication of Issues, which is before this Court.

II. Discussion

A. Playgirl's Request for Judicial Notice

Playgirl filed a Request for Judicial Notice of the Fact of Publication wherein it requests this Court to take judicial notice of the fact of publication of (1) documents Plaintiff produced; (2) published documents Plaintiff produced; (3) documents produced by Plaintiff's father; (4) published documents produced by Plaintiff's father; (5) published articles concerning Plaintiff printed from Lexis-Nexis; (6) published items concerning Plaintiff printed from the Internet; (7) published scenes from Plaintiff's television series, Baywatch; and (8) Plaintiff's published television interview on Donny & Marie.

A court must take judicial notice if a party requests it and supplies the court with the requisite information. Fed. R. Evid. 201(d). "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

Each of the above documents is publicly available from print, electronic or broadcast media. The fact of the publication of these materials is not reasonably in dispute because it is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. As such, this Court grants Playgirl's request to take judicial notice of the fact of the publication of these materials.

B. Objections to Evidence

1. Playgirl's Objections and Requests to Strike

1. The Claire Viguerie Harth deposition testimony: This Court overrules Playgirl's objection and denies its motion to strike this testimony.

2. Plaintiff's attempt to change his deposition testimony: This Court overrules Playgirl's objection and denies its motion to strike this testimony.

3. Plaintiff's labeling of Playgirl magazine as "pornography" or "pornographic": This Court overrules Playgirl's objection and denies its motion to strike this testimony.

4. Plaintiff's mischaracterization of the specified Theresa O'Rourke testimony: As set forth in detail in the analysis portion, below, this Court sustains Playgirl's objection.

5. Plaintiff's use of the February 2001 issue of Playgirl magazine: This Court sustains Playgirl's objection and grants its motion to strike references to it.

6. Statements made by Plaintiff unsupported by any admissible evidence: These statements do not form a proper basis for asserting objections and requests to strike. Rather, Playgirl's assertions that the statements are unsupported are more appropriately addressed in the analysis portion of this Order.

2. Plaintiff's Objections

1. Declarations of Ken Bank, Travis Dey, Budd Burton Moss, Christopher Nassis, Annie Schwartz, Steven

Vail, Joseph Sutton and Kent Raygor submitted with the reply brief: This Court sustains Plaintiff's objections to the declarations of Ken Bank, Travis Dey, Budd Burton Moss, Christopher Nassis, Annie Schwartz, Steven Vail and Joseph Sutton. This Court overrules Plaintiff's objection to the declaration of Kent Raygor.

2. Exhibit E to Raygor Decl. submitted with moving papers (published articles): This Court sustains Plaintiff's objection.

3. Exhibit F to Raygor Decl. submitted with moving papers (published articles): This Court sustains Plaintiff's objection.

4. Declaration of Bruce Chew: This Court sustains Plaintiff's objections to paragraphs 5, 6-8, 9, 10, 11, 14, 16-20, and 22.

C. Standard

Under the Federal Rules of Civil Procedure, summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 2514 (1986). If the moving party satisfies the burden, the party opposing the motion must set forth specific facts showing that there remains a genuine issue for trial. *Id.*; *see* Fed. R. Civ. P. 56 (e).

A non-moving party who bears the burden of proof at trial to an element essential to its case must make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element of the case or be subject to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). Such an issue of fact is a genuine issue if it reasonably can be resolved in favor of either party. *Anderson*, 477 U.S. at 250-51, 106 S. Ct. at 2511. The nonmovant's burden to demonstrate a genuine issue of material fact increases when the factual context renders her claim implausible. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986). Thus, mere disagreement or the bald assertion that a genuine issue of material fact exists no longer precludes the use of summary judgment. *Harper v. Wallingford,* 877 F.2d 728 (9th Cir. 1989); *California Architectural Building Prods., Inc. v. Franciscan Ceramics, Inc.,* 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied,* 484 U.S. 1006 (1988).

D. Analysis

1. The statute of limitations does not bar Plaintiff's claims

Playgirl contends that all three of Plaintiff's causes of action are barred by the one-year statute of limitations. In response, Plaintiff contends that Playgirl has not met its burden to establish that the statute of limitations bars his claims. This Court agrees with Plaintiff.

There is a one-year statute of limitations for invasion of privacy claims. *See* Cal. Civ. Proc. Code 340(3). "A defendant raising the statute of limitations as an affirmative defense has the burden of proving the action is time

barred." *California Sansome Co. v. U.S. Gypsum,* 55 F.3d 1402, 1406 (9th Cir. 1995). Under the Uniform Single Publication Act, adopted in California, the statute of limitations for defamation or invasion of privacy by false light in a printed publication does not begin to run until the publication is "generally distributed to the public." *Fleury v. Harper & Row Publishers, Inc.,* 698 F.2d 1022, 1027 (9th cir. 1983).

Playgirl states that it mailed the January 1999 issue of Playgirl to subscribers on or about November 13, 1998. It argues that since Plaintiff did not file his Complaint until November 24, 1999, one year and eleven days after the issue was mailed to subscribers, Plaintiff's claims are barred. However, the statute of limitations does not begin to run until the publication was actually sold on newsstands or received by a substantial majority of its subscribers. *See Osmers v. Parade Publications,* 234 F. Supp. 924, 926 (S.D.N.Y. 1964) ("What is really determinative is the earliest date on which the libel was substantially and effectively communicated to a meaningful mass of readers – the public for which the publication was intended, not some small part of it."); *McGuiness v. Motor Trend Magazine* (1982) 129 Cal. App. 3d 59, 61 (on-sale date for newsstand copies of magazine pre-dated filing of lawsuit by more than one year). According to Mr. Chew, Playgirl's president, the January 1999 Issue was not scheduled for newsstand display until December 8, 1998, placing Plaintiff's filing of the Complaint within the statutory period. (*See* Plaintiff Fact #107.) While Chew claims that copies were "delivered to the post office for mailing on or about November 13, 1998," nothing in the record indicates when a "meaningful mass" of readers received the magazine.

Moreover, Chew's statement is contradicted by the testimony of Playgirl's editor-in-chief at the time, who places initial distribution in December 1998. (*See id.*) As such, this Court concludes that Playgirl has failed to establish that the statute of limitations bars Plaintiffs' causes of action as a matter of law.

2. Plaintiff is a public figure

At the outset, this Court must address a primary issue over which the parties disagree – whether Plaintiff is a "public figure." Public figures are entitled to less protection against defamation and invasion of privacy than are private figures with respect to the publication of false information about them. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, (1974). A private figure only needs to prove that a defendant acted negligently in publishing false information about the individual, while a public figure must prove by clear and convincing evidence that the publication was motivated by actual malice. *See id.* at 345-46. The distinction between "public figures" and "private figures" was established by the United States Supreme Court in *Gertz*. The determination of whether Plaintiff is a public figure is a question of law. *Rosenblatt v. Baer,* 383 U.S. 75, 88 n.15, 86 S.Ct. 669, 677 n. 15 (1966). Playgirl bears the burden of proof to establish that Plaintiff is a public figure. *See Lerman v. Flynt Distributing Co.,* 745 F.2d 123, 136 (2d Cir. 1984).

The public figure distinction is broken down into two categories – general purpose public figures and limited public figures. *See Gertz,* 418 U.S. at 351. Playgirl contends that Plaintiff is a public figure under either of these categories.

a. Plaintiff is not a limited public figure

A limited public figure refers to an individual who voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. *See id.* Playgirl contends that Plaintiff has injected himself into several public controversies, all of which are addressed, at least incidentally, in the "TV Guys" article. It argues that Plaintiff thrust himself into the public debate about whether television is worth watching. Plaintiff disagrees, and so does this Court.

As Plaintiff argues, Playgirl has offered no evidence of any public debate on this issue and has shown no proof that Plaintiff in any way tried to influence the outcome of such a public controversy. Furthermore, Playgirl attempts to persuade this Court that the article debates whether television is worth watching; however, the content of the article offers no such debate. Other than profiling the ten actors, the only discussion offered by Playgirl in the January 1999 Issue is as follows:

> This television season boasts so many small screen sizzlers that there's no hotter place to be each night than couchbound, surfing the tube. With each show's stud even sultrier than the next, you won't want to miss PLAYGIRL's picks for the ultimate lusty lineup.

Moreover, Playgirl cannot rely on the assertion that television viewing may generally be a topic of "public debate." Courts have rejected such a position. *See Wolston v. Reader's Digest Association,* 443 U.S. 157, 167, 99 S.Ct. 2701 (1979) (reversing summary judgment: "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a

matter that attracts public attention"); *Rancho La Costa, Inc. v. Superior Court* (1980) 106 Cal. App. 3d 646, 658 (resort reportedly linked to organized crime not a public figure, despite public interest in fighting organized crime). Thus, this Court concludes that Plaintiff is not a limited public figure as a matter of law.

b. Plaintiff is a general purpose public figure

A general purpose public figure refers to an individual who has achieved such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. *See Gertz,* 418 U.S. at 351. Playgirl contends that Plaintiff's role as a series regular over a period of years on a show garnering 1.6 billion viewers worldwide must qualify him as a general purpose public figure. By contrast, Plaintiff argues that working actors are not automatically general purpose public figures. He asserts that he is not a household name recognized by a large percentage of the relevant population and that even Playgirl's witnesses admit that they did not know him before working on this issue.

This Court concludes that Plaintiff is a general purpose public figure. While this Court agrees with Plaintiff that working actors are not automatically general purpose public figures, courts often have found that there is a public interest which attaches to people who by their professional calling, such as actors, create a legitimate and widespread attention to their activities. Thus, the actions of such public figures may legitimately be mentioned and discussed in print or on radio or television. As has been stated: "A person may, by his own activities or by the force

of circumstances, become a public personage and thereby relinquish a part of his right of privacy to the extent that the public has a legitimate interest in his doings, affairs, or character." *Werner v. Times-Mirror Co.* (1961) 193 Cal. App. 2d 111, 117. Plaintiff has become such a public person.

Plaintiff was a series regular on the Baywatch television show from 1996 to 1999. (*See* Playgirl Fact #3.) Baywatch reaches 140 countries and is broadcast in 32 languages to a total of more than 1.6 billion people around the world. (*See id.* at Fact #10.) Plaintiff himself stated that "[i]t blows [his] mind how many people watch that show." (*See* Solano Depo., p. 64, Exh. D to Raygor Decl.) Plaintiff was elected "1994's Young and Modern Man" by YM Magazine, a nationwide magazine targeted to a teenage audience. (*See* Playgirl Fact #4.) While he starred on Baywatch, Plaintiff made a guest appearance on a network sitcom, Caroline in the City. (*See id.*) Since leaving Baywatch, Plaintiff has acted in two films and a television series. (*See id.*) He has been interviewed and has appeared in The Oprah Winfrey Show, Donny & Marie, Vibe, The Gong Show, Extra, and Entertainment Tonight, and has appeared in People, GQ, Cosmopolitan, Latin Style and Competitor magazines, and on the cover of Fitness Swimwear magazine. (*See id.*) Plaintiff has appeared in commercials for Wrigley's gum and Pepsi. (*See id.*) Plaintiff regularly participates in charity events as a "celebrity participant." (*See id.*)

It is not a persuasive argument that Plaintiff does not consider himself a celebrity or that some people, including some of Playgirl's employees, do not recognize Plaintiff. This Court doubts that all public figures are recognized by everyone or consider themselves celebrities. Plaintiff relies

on the case of *Harris v. Quadracci*, 856 F. Supp. 513, 516 (E.D. Wisc. 1994), wherein the district court held that the plaintiff was not a public figure even though she was an actress/model who appeared in television and nationally distributed motion pictures and posed nude in Playboy magazine. However, in *Harris*, the district court did not set forth any reasoning in support of its determination. Rather, the court summarily stated, "[T]his is not quite enough, in my view, to make her a public figure for all purposes." *See id.* at 517. Thus, this Court cannot find that the reasoning of that non-binding district court case is persuasive here. Instead, this Court is persuaded by case law from other jurisdictions which support the notion that actors and entertainers are public figures. *See, e.g., Carlisle v. Fawcett Publications, Inc.* (1962) 201 Cal. App. 2d 733, 746-47 (labeling as "public figures" actors and actresses, professional athletes, public officers, noted inventors, explorers and war heroes); *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1141 (7th Cir. 1985) ("Entertainers can therefore be public figures for purposes of a publisher's . . . First Amendment defense to a charge of false-light invasion of privacy."); *Man Warner Bros., Inc.*, 317 F. Supp. 50 (S.D.N.Y. 1970) (referring to plaintiff's "frivolous" contention that an entertainer, performing on a stage before 400,000 people, is not a public figure). This Court agrees with these determinations. The evidence set forth above and on record with this Court establish that Plaintiff is a public figure.

Finally, it is worth mentioning that Plaintiff has had opportunities to refute Playgirl's use of his photographs on the cover and in the article of the January 1999 Issue and has done so. In January 1999, Plaintiff appeared on the television show Donny & Marie, on which he conveyed a

message to the public that he had not appeared nude in Playgirl. Plaintiff has told several television reporters that he did not appear nude in Playgirl. He denied that he had appeared nude in Playgirl in several news articles, such as the Daily News (New York), the Los Angeles Times, in the City News Service (Los Angeles), on the BPI Entertainment News Wire and in the Courthouse News Archive. Plaintiff's refutation also ran on the cable news network CNBC in December 1999. While this evidence is not dispositive that Plaintiff is a public figure, it supports one of the underlying basis for reduced First Amendment protection for pubic figures that a public figure has greater access to media channels to dispute false information about him. *See Gertz,* 418 U.S. at 344-45.

Based on the foregoing, this Court concludes that Plaintiff is a general purpose public figure as a matter of law.

3. Playgirl is entitled to summary judgment as to Plaintiff's cause of action for invasion of privacy – false light

In his third cause of action, Plaintiff alleges a claim for false light invasion of privacy.

To prevail on this claim, Plaintiff must show: (1) that Playgirl disclosed to one or more persons information about or concerning Plaintiff which was presented as factual but which is actually false or created a false impression about Plaintiff; (2) that the information was understood by one or more persons to whom it was disclosed as stating or implying something highly offensive that would have a tendency to injure his reputation; (3) by clear and convincing evidence that Playgirl acted with

constitutional malice; and (4) that he was damaged by the disclosure. *See Fellows v. National Enquirer, Inc.* (1986) 42 Cal.3d 234, 238-39.

Playgirl contends that summary judgment is warranted because Plaintiff cannot meet his burden of proof on any of these elements.

a. Plaintiff cannot show that Playgirl disclosed information concerning Plaintiff which created a false impression about Plaintiff

Playgirl argues that it is not sufficient for Plaintiff to claim that Playgirl put him in a false light solely by putting him on the cover of the magazine.

Plaintiff does not disagree that his photographs and accompanying text of the January 1999 Issue are true. Rather, he contends that the false implication that a plaintiff is voluntarily associated with a distasteful or obscene magazine and posed nude is a recognized basis for this claim. He asserts that the use of his photograph without his consent to promote a pornographic magazine is indecent and highly offensive to the ordinary person. Plaintiff argues that Playgirl conveyed the false impression by surrounding his photograph with these intentionally misleading headlines: "Primetime's Sexy Young Stars Exposed," "12 Sizzling Centerfolds Ready to Score With You," "Hot Celebrity Buns," and "Baywatch's Best Body Jose Solano."

This Court agrees with Playgirl that it is not sufficient for Plaintiff to claim that it put him in a false light solely by putting him on the cover of an explicit magazine.

Playgirl cites to the case of *Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527 (9th Cir. 1984), which this Court finds is analogous to the situation before this Court. In *Brewer*, the plaintiff created a photograph which simulated him shooting himself through the head. *See id.* at 528. He entered into an agreement for the commercial sale of the photograph in the form of a postcard. *See id.* Hustler subsequently reproduced a portion of the postcard in its magazine. *See id.* The plaintiff sued Hustler magazine for violating his privacy by publishing his non-nude photograph in the sexually explicit magazine. The Ninth Circuit affirmed the dismissal of his claim, stating that "this argument is without merit because Brewer had no right to choose the forum in which his photograph was displayed." *See id.* at 530. Similarly, here, Plaintiff asserts a violation of his privacy by the publishing of his photograph in what he terms a "distasteful or obscene magazine." Plaintiff attempts to distinguish *Brewer* by stating that there was no allegation that the plaintiff in *Brewer* was cast in a light that implied nudity, sexual content or voluntary association with Hustler. While the *Brewer* plaintiff might not have worded his allegation in an identical manner as Plaintiff here, the basis for the false light claims are essentially the same – publication of his photographs in a magazine with sexual content objectionable to the plaintiff. As such, the Ninth Circuit's reasoning in *Brewer* is applicable here – Plaintiff, a public figure, unfortunately has no right to choose the forum in which his republished photograph is displayed especially when Plaintiff consented to the use and sale of his photographs in commercial photo stock houses.

The *Brewer* court cited to another case, *Ann-Margret v. High Society Magazine, Inc.*, 498 F. Supp. 401 (S.D.N.Y.

1980), wherein the court rejected the plaintiff's right to privacy claim, noting that once a person has sought publicity, like the actress filing the lawsuit, "he cannot at his whim withdraw the events of his life from public scrutiny." *See id.* at 405. This reasoning is also equally applicable here. While Plaintiff wishes otherwise, once he became part of an extremely popular television series and participated in the events and opportunities associated with it, he relinquished a certain amount of control over the publication of events of his life.

Plaintiff argues that *Ann-Margret* is distinguishable because there was no implication of voluntary association, and the magazine was not offensive, merely "tacky." This Court disagrees. The plaintiff in *Ann-Margret* "violently object[ed]" to [the photograph's] inclusion in such a format." *See id.* at 404. The format was characterized by plaintiff as "hard core pornography." *See id.* at 403. Furthermore, the *Ann-Margret* court's description of the magazine as "merely tacky" versus "offensive" is not significant. Indeed, this Court doubts that the court in *Ann-Margret* would have reached a different conclusion even if it had found that the magazine was "offensive." Rather, the court found that the use of a person's name or picture in the context of an event within the "orbit of pubic [sic] interest and scrutiny" can rarely form the basis for an actionable privacy claim. *See id.* at 405.

In arguing that he can sustain a false light claim, Plaintiff relies on the case of *Douglass v. Hustler Magazine*, 769 F.2d 1128, 1135 (7th Cir. 1985), wherein the plaintiff asserted a false light claim because Hustler "insinuate[d] that she is the kind of person willing to be shown naked in Hustler." Id. at 1135. The Seventh Circuit determined that this insinuation could form the basis of a

false light claim, relying on the degrading setting of the magazine. *See id.* at 1135-36. While this Court acknowledges that the *Douglass* holding arguably could support Plaintiff's claim here, this Court finds that the decision in *Brewer* is more well-reasoned and controls the determination before this Court as binding Ninth Circuit precedent. Moreover, in reaching its determination, the Seventh Circuit in *Douglass* found it significant that the nude photographs of plaintiff had not been published before. It stated that "[i]f a photograph has been published previously the implied representation that its present publication is with the consent of the subject is weakened." *See id.* at 1136. Such is the case here.

Plaintiff also relies on *Braun v. Flynt*, 726 F.2d 245, 256 (5th Cir. 1984), wherein the court found that the plaintiff had established a false light claim based on evidence that the defendant placed plaintiff's picture in a magazine devoted to the publication of lewd pictures of women and to sexual exploitation. *See id.* at 254. However, this Court finds that Plaintiff's reliance on this case is misplaced. First, this Court notes that the *Braun* court found that the plaintiff was not a public figure. *See id.* at 250. Moreover, as argued by Playgirl, a subsequent decision in that same circuit noted that *Braun* did not hold that the plaintiff was placed in a false light merely because she objected to the contents of the magazine. *See Faloona v. Hustler Magazine, Inc.*, 607 F. Supp. 1341, 1356 (N.D. Tex. 1985). As the court stated:

> If the Braun panel had intended to hold this, it would have been obligated to distinguish – or to disapprove – numerous cases which hold that there is no right of privacy action merely because a person's photograph or name appears in a

> magazine whose content is objectionable to that person. *See, e.g., Ann-Margret v. High Society Magazine, Inc.,* 498 F.Supp. 401 (S.D.N.Y.1980); *Faucheux v. Magazine Management,* 5 Media L.Rptr. 1697 (E.D.La.1979); *Falwall v. Penthouse International, Ltd,* 521 F.Supp. 1204 (W.D.Va. 1981); *Handelman v. Hustler Magazine,* 469 F.Supp. 1053 (S.D.N.Y.1979); *Goelet v. Confidential, Inc.,* 5 A.D.2d 226, 171 N.Y.S.2d 223 (1958). As stated in *Handelman*: 'But magazines with sexually explicit text and photographs of genitalia are part of our contemporary scene. Successful candidates for the presidency of the United States consent to interviews in magazines of the same genre as Hustler. We think that Plaintiff is not entitled to damages merely because there is an oblique reference to him in a magazine which he believes to be in bad taste.' (469 F.Supp. at 1060).

See id. at p. 1357 n. 48.[2]

Thus, in light of the foregoing, this Court concludes that Plaintiff has failed to establish a genuine issue of material fact that Playgirl's use of his photographs created a false impression. Consequently, because Plaintiff cannot establish an essential element, Plaintiff's cause of action for invasion of privacy – false light fails as a matter of law.

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[2] The *Faloona* opinion was affirmed in *Faloona v. Hustler Magazine, Inc.,* 799 F.2d 1000 (5th Cir. 1986).

b. Plaintiff cannot show actual malice

This Court notes that it does not need to reach the element of actual malice since Plaintiff has failed to satisfy his burden with respect to the false impression element. Nonetheless, this Court briefly addresses the parties' arguments regarding actual malice because this Court further concludes that Plaintiff cannot carry his burden with respect to this element.

Playgirl argues that Plaintiff cannot prove that Playgirl acted with actual malice with regard to the alleged false implication. It states that Playgirl's senior staff who supervised the creation of the January 1999 Issue testified that they believed either that Plaintiff was a celebrity or that any television actor or personality was a celebrity and that the issue of the word "exposed" on the cover had a journalistic meaning and referred to a story that revealed something about its subjects. Plaintiff, on the other hand, contends that the record contains ample evidence that Playgirl published Plaintiff's photograph and its accompanying headlines with actual malice – knowledge that it was conveying a false impression, or reckless disregard for truth or falsity.

This Court has concluded as a matter of law that Plaintiff is a public figure. As such, both parties agree that Plaintiff must show that Playgirl published Plaintiff's photograph and accompanying headlines with actual malice – knowing or reckless falsehood. *See Eastwood v. Superior Court* (1983) 149 Cal. App. 3d 409, 424. The burden is on the plaintiff to affirmatively establish by clear and convincing evidence that a genuine issue of fact exists as to whether actual malice can be proven at trial.

See Aisenson v. ABC, Inc., (1990) 220 Cal. App. 3d 146, 154. As stated in *Aisenson*:

> Reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

See id. at 160; *St. Amant v. Thompson,* 390 U.S. 727, 731, 88 S.Ct. 1323, 1325 (1968). "The question of whether the evidence in the record . . . is sufficient to support a finding of actual malice is a question of law." *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 658, 109 S.Ct. 2678 (1989).

Playgirl, of course, points to the testimony of its editors that they had no subjective doubts in using Plaintiff's photographs. While this evidence is probative, this Court is mindful of what the Ninth Circuit has stated: "[W]e have yet to see a defendant who admits to entertaining serious subjective doubt about the authenticity of an article it published[.]" *Eastwood v. National Enquirer, Inc.,* 123 F.3d 1249, 1253 (9th Cir. 1997). In any event, this Court must look to whether Plaintiff has presented sufficient evidence from which a jury could find that Playgirl has published with actual malice. In his claim of actual malice, Plaintiff relies exclusively on testimony from Serena Spiezio, an associate art director, and Theresa O'Rourke, an associate editor. Ms. Spiezio and Ms. O'Rourke testified that they thought the use of the word "exposed" could mean nudity and that they didn't feel like

it was fair to use this language. However, as mentioned above, Plaintiff offers no evidence that any senior editor who had the final say as to what went into the issue entertained any serious doubts as to whether the publication was misleading. Moreover, neither Ms. Spiezio nor Mr. [sic] O'Rourke testified that concerns over use of Plaintiff's image in a misleading manner were raised and rejected by senior editors. In fact, Ms. Spiezio testified to her belief that someone reading the banner might expect Plaintiff to be nude inside. This belief only guesses at what a bystander might think and does not address the subjective beliefs of Playgirls' editors. Plaintiff also states that when concerns about the false impression were raised, they were "blown off" by Bellucci; "[i]t was just, so what." However, Playgirl objects to, and seeks to strike, the recitation of this testimony on the basis that it is misleading and improper. Playgirl's objection is well taken. When viewed in context, Ms. O'Rourke did not remember saying anything specific about the headline's implication that Plaintiff would be a centerfold; she thought that maybe someone had voiced something, but she was not sure. (*See* O'Rourke Depo., p. 58; Exh. K to Raygor Decl.) She also stated generally that concerns were "always kind of blown off." (*See id.*) However, she offers no specifics about the 1999 January Issue. In light of the above, this Court concludes that this evidence is not sufficient, to support a finding of actual malice as a matter of law.[3]

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[3] This Court notes that Playgirl addresses what it believes is Plaintiff's argument that Playgirl is guilty of malice because it used photos despite receiving stock houses invoices stating "N [sic] model releases exist." However, this Court disagrees that Plaintiff made any such argument in its opposition. While Plaintiff identifies these as

(Continued on following page)

4. Playgirl is entitled to summary judgment as to Plaintiff's cause of action for statutory misappropriation of right to publicity

In his first cause of action for statutory misappropriation of his right to publicity, Plaintiff alleges injury stemming from the use of two photographs of him in the January 1999 Issue.

California Civil Code section 3344 ("Section 3344") provides a cause of action for damages when any "person . . . knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods . . . without such person's prior consent. . . ." However, under Section 3344(d), there is no relief for uses "in connection with any news, public affairs, sports broadcast or account. . . ." It is under this section that Playgirl asserts its defense and seeks summary judgment as to the first cause of action. Specifically, it argues that both photographs were used in connection with a news or public affairs account about television celebrities. It concludes that Playgirl's truthful, newsworthy use of Plaintiff's photographs provides a complete defense to Plaintiff's statutory misappropriation claim.

This Court agrees with Playgirl that its use of Plaintiff's photographs is protected under Section 3344 (d). The statute protects matters of public interest and about public affairs. Indeed, "public affairs" means "something less important than news" and includes things that "may

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facts, he does not use them in the context of any argument. As such, this Court does not address Playgirl's purported responsive arguments.

not event [sic] be important, but are of interest." *Dora v. Frontline Video, Inc.,* (1993) 15 Cal. App. 4th 536, 543 and 545. As stated by the Supreme Court, "Entertainment itself can be important news." *Zacchini v. Scripps-Howard Broadcasting, Co.,* 433 U.S. 562, 578, 97 S.Ct. 2849, 2859 (1977). The United States Supreme Court, explaining the "public interest" privilege in a privacy context, stated: "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press." *Time, Inc. v. Hill,* 385 U.S. 374, 388, 87 S.Ct. 534, 542 (1967).

Here, Plaintiff appeared in one of the most-watched television shows in the world. Certainly, his photographs used in connection with a public affairs account about television celebrities in general and about his life in specific are newsworthy. As stated by one court, "[T]he accomplishments and way of life of those who have achieved a marked reputation or notoriety by appearing before the public such as actors . . . may legitimately be mentioned and discussed in print or on radio or television. Such public figures have to some extent lost the right of privacy. . . ." *Carlisle v. Fawcett Publications, Inc.,* (1962) 201 Cal. App. 2d 733, 736-4; *see also Lerman v. Flynt Distributing Co., Inc.,* 745 F.2d 123, 137-38 (2d Cir. 1984) (an article including nude pictures of a celebrity is unquestionably "within the broad definition of a newsworthy matter or a matter of public interest").

Plaintiff argues that the Section 3344(d) exemption does not apply when a party uses the name or likeness of another in a knowingly false manner and that triable issues of fact exist with respect to this issue. In making

this argument, Plaintiff relies on the same evidence discussed above with respect to the actual malice inquiry. However, as found above, Plaintiff's evidence is insufficient to support a finding of a knowing or calculated falsehood.

Thus, in light of the foregoing, this Court concludes that Playgirl has established a defense to Plaintiff's claim under Section 3344. As such, Playgirl's publication of Plaintiff's photographs is not a use for which consent is required under Section 3344, and Plaintiff's first cause of action fails as a matter of law.[4]

5. Playgirl is entitled to summary judgment as to Plaintiff's cause of action for common law commercial misappropriation

In his second cause of action for common law invasion of privacy – misappropriation of likeness, Plaintiff alleges that Playgirl made unauthorized use of his name, likeness and right of publicity.

Under common law commercial misappropriation invasion of privacy, Plaintiff must establish: (1) defendant's use of plaintiff's identity; (2) appropriation of plaintiff's name or likeness to defendant's advantage,

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[4] Playgirl requests an award of its attorneys' fees and costs pursuant to Section 3344 (a). Section 3344(a) provides that the "prevailing party in any action under this section shall also be entitled to attorney's fees and costs." This Court finds that such an award is proper under Section 3344 (a), in an amount to be determined upon proper proof.

commercially or otherwise; (3) lack of consent; and (4) resulting injury. *See Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 413-14 (9th Cir. 1996). Playgirl seeks summary judgment as to this cause of action proffering the same defense as it does under Section 3344 – that Playgirl's use of Plaintiff's name and photographs is a protected news and pubic [sic] interest account. Plaintiff correspondingly offers the same argument as above – that the use of an actor's name and photograph in a magazine is not protected by any such privilege where the use entails "a calculated falsehood."

For the same reasons discussed above with respect to the statutory misappropriation claim, this Court concludes that Plaintiff's common law commercial misappropriation claim fails as a matter of law. The common law "public interest" protection is synonymous with the Section 3344 "public affairs" protection. *See Dora v. Frontline Video, Inc.*, (1993) 15 Cal. App. 4th 536, 545-46.[5]

D. Conclusion

In sum, Plaintiff is a pubic [sic] figure, and consequently, he receives less protection against his invasion of privacy with respect to the publication of arguably false information about him. The First Amendment reduction of protection for public figures came about for two reasons: (1) a public figure has greater access to media channels to dispute false information about him; and (2) a public figure has, in voluntarily entering public life, agreed to

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[5] Based on the foregoing conclusions, this Court does not need to reach the issue of damages as raised by Playgirl.

subject his actions to greater scrutiny, and accordingly need [sic] less protection form [sic] harm by the State. *See Gertz,* 418 U.S. at 344-45. Undoubtedly, Plaintiff is unhappy and embarrassed about the appearance of his picture in Playgirl, and this Court sympathizes with his feelings.[6] However, his dislike of the manner in which he is portrayed or the magazine in which his picture is reproduced and his proclaimed embarrassment and negative reaction he has felt over the reproduction do not provide a basis for the claims he asserts. To find otherwise would lead to self-censorship and chill the exercise of the freedom of speech, both of which are forbidden results under the First Amendment.

Accordingly, this Court **grants** Defendant Playgirl, Inc.'s Motion for Summary Judgment Against Plaintiff on All Claims.

IT IS SO ORDERED.

DATED: 2/12/2001

DICKRAN TEVRIZIAN
Dickran Tevrizian, Judge
United States District Court

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[6] Indeed, this Court is aware that judges are often deemed limited purpose public figures, and as such, could find themselves cover models for these same types of publications which may be part of the contemporary scene but could be potentially embarrassing nonetheless.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOSE SOLANO, JR, Plaintiff, v. PLAYGIRL, INC., and DOES 1 THROUGH 25, inclusive, Defendants.	Case No. CV 00-01242 DT (Ex) **FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTING THE COURT'S FEBRUARY 12, 2001 *ORDER GRANTING DEFENDANT PLAYGIRL, INC.'S MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFF ON ALL CLAIMS*** [Fed. R. Civ. P. 56, Local Rule 14.3] *Summary Judgment Hearing* Date: February 12, 2001 Time: 10:00 a.m. Ctrm: The Hon. Dickran Tevrizian

(Filed Feb. 27, 2001)

On February 12, 2001, in an *Order Granting Defendant Playgirl, Inc's Motion For Summary Judgment Against Plaintiff On All Claims*, this Court granted *Defendant Playgirl, Inc.'s Motion For Summary Judgment Against Plaintiff Solano On All Claims [Fed. R. Civ. P.*

56(b)] Or, In The Alternative, For Summary Adjudication Of Issues [Fed. R. Civ. P. 56(d)], filed on January 22, 2001. The particular findings of fact and conclusions of law supporting the February 12, 2001 *Order* are now set forth.

I.

FINDINGS OF FACT

On the record of this proceeding, there is no genuine issue as to any of the following facts. To the extent that any of the following statements addresses matters of law, it is included in this section for the sake of coherence of presentation. In addition, some of the facts included under one subheading are relevant to issues presented under other subheadings.

A. Defendant Playgirl, Inc. And Playgirl Magazine.

1. Defendant Playgirl, Inc. ("Playgirl") publishes *Playgirl* magazine. [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 1.] *Playgirl* is a monthly, internationally distributed magazine that has been in continuous publication for more than a quarter century. [Chew Decl., ¶ 2.] Since at least 1990, every issue of Playgirl magazine has contained nude photographs, including a nude "centerfold". [Defendant Playgirl's Response to Solano's Statement of Fact No. 79.] While its issues typically contain nude photographs of men, *Playgirl* also includes significant editorial content aimed at entertaining, informing, and educating its female readership. [Chew Decl., ¶¶ 2-5; the contents of the January 1999 issue of *Playgirl* magazine lodged with the Court.]

B. Plaintiff José Solano, Jr.

2. Plaintiff Solano, the first Latino actor hired as a regular cast member on the popular television series *Baywatch*, played rookie lifeguard "Manny Gutierrez" on the show. [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement Nos. 13 and 14.] He was a series regular on the *Baywatch* television show from 1996 to 1999. [Plaintiff Solano Depo., at 187:10-15; Solano's *Motion For Leave To File A Jury Demand*, at 1:4-5; *Complaint* at ¶ 3; Bonann Decl. at ¶ 3.] He appeared in 7 or 8 episodes of *Baywatch* in the 1996-97 television season, 10 episodes in the 1997-98 television season, and three episodes in the 1998-99 television season. [Defendant Playgirl's Response to Solano's Statement of Fact No. 71.]

3. Plaintiff Solano has judicially and otherwise admitted that he was a star of *Baywatch*. [November 24, 1999 *Complaint*, ¶¶ 1 and 3; Solano's May 11, 2000 *Factual Synopsis of the Case*, at 1:3; Solano Docs. JS108-109 (Solano press kit), submitted as part of Exhibit A to the January 22, 2001 *Raygor Decl. Re Solano-Produced Documents And Published Matter Concerning Solano*; plaintiff Solano's January 1999 interview on the *Donny & Marie* show, transcribed in ¶ 23 of the January 22, 2001 *Raygor Decl. Re Solano-Produced Documents And Published Matter Concerning Solano* and contained in full at the end of the videotape lodged with Playgirl's *Notice of Lodging Physical Evidence*.]

4. Solano is the lead character in the film *Rubbernecks*, is a featured actor in the film *On Edge* with *Seinfeld's* Jason Alexander, is developing several film projects as a producer in which he would appear, was a supporting actor in the Summer 2000 *Resurrection Boulevard* series

shown on Showtime, appeared as a guest star on the season finale of the TV sitcom *Caroline In The City*, appeared on stage in various theater productions, has done numerous commercial promotions and endorsements, including the promotion of fat-free milk products for "Say Yes", the endorsement of the POWER BAR™food product, the promotion of NAUTICA® brand clothing, a photo shoot for PANOS EMPORIO™ swimwear, a commercial for WRIGLEY'S® gum, and an internationally televised commercial for PEPSI® cola., has done public service ads for the City of New York and the American Cancer Society, appeared in a poster in *YM* magazine where he was named "1994's *Young & Modern* Man of the Year" and in other issues of *YM*, was interviewed on *The Oprah Winfrey Show*, was interviewed on the nationally broadcast *Donny & Marie* show, was interviewed by comedian Sinbad, the host of the television show *Vibe*, was interviewed on TV on *The Maria Conchita Alonzo Show*, made a guest appearance on *The Big Date*, made a guest appearance on the *Keenan Ivory Show*, was interviewed on the *Gayle King Show*, made a guest appearance on *Pictionary*, made a guest appearance as a judge on *The Gong Show*, was interviewed on the *Home & Family* show, was interviewed by the TV show *Extra*, was the subject of a special feature and interview by the TV show *Entertainment Tonight*, was featured on the cover of the January/February 2000 *Fitness Swimmer* magazine, appeared in *GQ* magazine, appeared in *Latin Style* magazine, was invited as a special guest of the National Hispanic Foundation for the Arts to meet with President Clinton and Vice President Gore in Washington, D.C., was a celebrity invited to participate in the "K-Mart Kids Race", was a celebrity racer in the "Toyota Grand Prix Celebrity Race", was asked to participate in the "Revlon Run Walk" event, the organizers of

which invite various celebrities to participate in order to raise awareness and raise more money, is a singer on a music CD, participated as an actor as part of the *Entertainment Tonight* team in the "Jimmy Stewart Marathon", recently appeared as the Grand Marshal for the Winter Festival Parade in Florida, recently appeared at a "meet and greet" at Planet Hollywood® in San Francisco, has photographs that are sold on the eBay® Internet auction house, was interviewed and profiled at length for CBS' Internet news website, *www.channel2000.com*, has played basketball with the Hollywood Knights Celebrity Basketball Team, has participated with other actors in a "Celebrity Bachelor Auction", has been in the City of Huntington Beach Parade, has been invited several times to participate as one of many actors in the "Nautica® Malibu Triathlon", appears in the "Boys of Baywatch" website (*www.members.tripod.com/~boysofbw/jsolano/*), was asked to lend his name as a host of a GRAMMY® party honoring GRAMMY® award-winning musician Carlos Santana, participated in the annual "Celebrity Race" at the 1997 "Jimmy Stewart Marathon", made a speech televised by several television stations for a Thanksgiving event sponsored by Vons®, participated in basketball star Shaquille O'Neal's "Athletes & Entertainers for Kids®" event and in model and actress Kathy Ireland's "Athletes & Entertainers for Kids®" event, still participates in *Baywatch*-related events, won an acting award at the 1997 "Nosotros Golden Eagle Awards" ceremony, was nominated for the "Outstanding Individual Performance in a Nationally Syndicated Drama Series" award at the 1998 American Latino Media Arts ("ALMA") Awards, appeared as a "'Baywatch' star" at the 1997 Family Fest event in Milwaukee, was a judge at the 1999 Miss Commerce Pageant, participated as one of the celebrities in the 1996 Hollywood

Christmas Parade, participated in the Second Annual Los Angeles Fire Department Celebrity Golf Tournament, participated in the "YWCA Wings Celebrity Classic" in April 1999, was a spokesman for the American Cancer Society, signed autographs as a celebrity at Knotts Berry Farm and Sea World and in Las Vegas and Los Angeles, appeared at car shows in San Antonio and Houston, was a celebrity guest at the Pro Football Hall Of Fame in Canton, Ohio, and was the winner of modeling competitions. [Plaintiff Solano Depo., at 76:25-77:18, 78:21-79:4, 81:12-24, 83:20-84:3, 84:22-85:9, 88:20-24, 89:20-91:7, 93:13-94:9, 100:16-101:1, 102:1-11, 102:16-103:2, 105:22-25, 106:13-24, 108:24-109:4, 109:10-12, 109:19-23, 110:1-9, 110:19-111:15, 111:25-112:6, 112:7-11, 114:5-18, 116:25-117:8, 118:2-18, 119:1-120:2, 123:13-22, 125:8-127:2, 128:18-23, 129:7-17, 129:21-132:4, 134:5-136:3, 144:21-146:9, 146:10-20, 147:3-9, 147:13-148:6, 160:25-162:2, 162:16-164:13, 164:16-165:5, 165:6-166:4, 167:4-14, 169:18-170:18, 171:3-174:1, 172:2-14, 172:17-173:18, 173:23-174:7, 174:8-22, 174:23-175:11, 176:8-20, 178:1-8, 178:14-18, 178:19-25, 181:13-182:9, 185:24-186:15, 197:21-198:18; Solano Sr. Depo., at 24:24-25:5, 24:14-16, 25:20-25; 26:16-19, 27:2-5, 27:6-7, 27:8-9, 27:10-11, 27:12-17, 29:19-30:7, 30:19-31:4, 57:4-10, 66:16-67:5, 67:6-68:1, 137:21-138:2, 138:15-18, 140:20-141:2, 141:20-142:1, 142:2-143:7, 143:18-24, 144:7-13, 149:8-17, 149:20-22, 149:24-150:6, 150:7-16, 150:20-25, 151:1-19, 154:19-23, 154:25-155:10, 157:3-9, 160:25-161:8, 164:18-21, 166:4-8, 166:11-167:6, 174:10-18 176:2-10, 176:13-24, 177:11-20; Solano's *Response to Request for Admission* ("*RFA Response*") No. 14.]

5. Solano is well-known enough through his three seasons of acting on *Baywatch* and his many appearances that he no longer needs to have much in the way of publicity

materials. [Solano, Sr. Depo., 23:12-24:13, 127:6-18, 130:18-131:25.] Other people perceive him as a celebrity. [Plaintiff Solano Depo., at 120:33-121:4.] Many pages of references to plaintiff Solano in the media refer to Solano's "celebrity" or "star" status. [Exhibits B, D, and E (Tabs 1-8, 13-18, and 37-63) to the January 22, 2001 *Raygor Decl. Re Solano-Produced Documents And Published Matter Concerning Solano.*]

6. When not performing as an actor, Solano devotes a considerable amount of time to charity work. [Defendant Playgirl's Response to Solano's Statement of Fact No. 73.] He prides himself on being a positive role model for young people. [Defendant Playgirl's Response to Solano's Statement of Fact No. 74.]

C. The *Baywatch* Television Show.

7. *Baywatch* has been characterized in Solano's own press kit as "a hit international show," and in other materials as "the most watched television show on the planet Earth." [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 9.] By Solano's own admission, the show reaches 140 countries and is broadcast in 32 languages to a total of more than 1.6 billion people around the world. [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 10; Plaintiff Solano Depo., at 64:16-24: "It blows my mind how many people watch that show."]

D. Plaintiff Solano And *Baywatch*.

8. After two seasons with *Baywatch*, plaintiff Solano feared that he would be typecast if he remained on the

show, and negotiated his exit so he could pursue other career paths. He agreed to be featured in just three episodes in the 1998-99 season – his third season – in which his character would become paralyzed and be written off the show. [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement Nos. 19 and 66.] His last episode was produced in September 1998 and first aired in February 1999. [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 21.]

9. Despite the fact that plaintiff Solano left the role in 1999, repeat shows on which he appeared are still being broadcast in syndication. [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 22.]

10. Since the end of his tenure on *Baywatch*, Solano has had roles in film, television, and commercials, but has not garnered a recurring role on the regular cast of a television series. [Defendant Playgirl's Response to Solano's Statement of Fact No. 72.]

E. The January 1999 Issue Of Playgirl Magazine.

11. In a feature entitled "TV Guys" in its January 1999 issue of *Playgirl* magazine, Playgirl used photographs of ten television actors to accompany an article describing the actors, their careers, and something about them. [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 23.] Playgirl neither took nor commissioned the photographs. Playgirl acquired the photographs from photo stock houses, services that keep photographs on file and will sell copies to magazines like *Playgirl*. [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 25; Defendant Playgirl's Response to Solano's Statement of Fact No. 90; Chew

Decl., ¶ 13.] None of the actors featured in the article is nude or in any state of undress. [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 24.]

12. The Editor's Note introducing the January 1999 issue states, in part, on page 2:

> "This month we celebrate the medium that has transformed the globe – television. Technology has transported entertainment into the privacy of your own home, and who better to cozy up to than our sizzling TV Guys on page 20?"

[Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 42.] Page 2 is also the first page of the table of contents for the issue. It includes a photograph of one of the celebrities featured in the "TV Guys" feature (TV actor Dan Cortese) accompanied by a caption that states: "TV Guys – why television is good for you." [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 43.] Page 3 includes the actual table of contents listing for the article, under the heading "features." The "TV Guys" feature is listed as starting on page 20, and is labeled: "**TV Guys** Top Of The Tube. 10 reasons why television is good for you." [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 44.]

13. The article is titled "TV Guys – Primetime's sexy young stars make for one steamy season." The profiles of the featured actors are prefaced by the following paragraph:

> "This television season boasts so many small screen sizzlers that there's no hotter place to be each night than couchbound, surfing the tube.

> With each show's stud even sultrier than the next, you won't want to miss PLAYGIRL's picks for the ultimate lusty lineup."

[Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 34.] Three of the six pages in the feature contain a "TV Guys" logo in an upper corner of the page, including the page on which a photograph of plaintiff Solano appears. [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 35.]

14. The January 1999 issue contains two photographs of plaintiff Solano. One is on the cover and depicts Solano in swim trunks with chest exposed in a beach setting. [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 26.] The other photograph is a head-and-shoulders shot of Solano inside the magazine in the "TV Guys" feature. [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 27.] Solano has never authorized Playgirl to use his name or photograph in any way. [Defendant Playgirl's Response to Solano's Statement of Fact No. 76.]

15. The "TV Guys" feature contains a photograph of plaintiff Solano and photographs of nine other television actors chosen by *Playgirl*: Dan Cortese of *Veronica's Closet*, Matt LeBlanc of *Friends*, David Boreanaz of *Buffy The Vampire Slayer*, Scott Speedman of *Felicity*, Rob Estes of *Melrose Place*, Duane Martin of *Getting Personal*, Ryan Reynolds of *Two Guys, A Girl And A Pizza Place*, Jeremy London of *Party Of Five*, and Joe Rogan of *NewsRadio*. [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 31.] Each photo is accompanied by a profile of the pictured actor, including information on the television show on which he appears; at what time and on what network the show can be viewed; the character

played by the actor; information about the actor's career and history; and additional personal information about the actor. [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 32.]

16. Both of the photographs of Solano used in the January 1999 *Playgirl* issue are true and substantively unaltered. [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 29.] The article accompanying the photograph of Solano inside the magazine highlights plaintiff Solano's experience as a Desert Storm veteran, a U.S. Navy medic and a Junior Olympic soccer champion and sets forth his goal "to encourage others to go for their dreams." [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 33.] Every part of the profile about Solano that is placed next to the photograph of him inside the magazine in the "TV Guys" feature is true. [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 30.]

17. The photograph of plaintiff Solano that appears on the cover is surrounded by headlines, also known as cover lines, announcing some of the articles featured inside the magazine. [Chew Decl., ¶ 6; the cover and contents of the January 1999 *Playgirl* issue.] One of the cover lines refers directly to Solano: "*Baywatch*'s Best Body Jose Solano." [Cover of the January 1999 *Playgirl* issue.]

18. The title of the magazine, PLAYGIRL, is stripped in large letters across the top of the magazine and is partly obscured by the image of Solano's head, which overlaps it. [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 40.] The title is accompanied by the tag line: "25 Years of Entertainment

For Women." [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 41.] Above the PLAYGIRL title is a cover line that states: "TV Guys – Primetime's Sexy Young Stars Exposed." [Cover of the January 1999 *Playgirl* issue.]

19. Below the PLAYGIRL title and to the left of plaintiff Solano's photograph is a cover line that states: "12 Sizzling Centerfolds Ready To Score With You." [*Id.*] In the lower left-hand corner of the cover and to the left of the photograph of Solano is a cover line that states: "Bottoms Up! Hot Celebrity Buns." [*Id.*] In the lower right-hand corner of the cover and to the right of the photograph of Solano is a cover line that states: "*Baywatch's* Best Body - José Solano." [*Id.*]

20. The scheduled on-sale date for the January issue was December 8, 1998. [Chew Decl., ¶ 22.] Playgirl's editor-in-chief at the time places initial distribution of the issue as possibly in early December 1998. [Harth Depo., 66:10-17.] Plaintiff Solano testified that he first heard of the photograph of him on the cover of Playgirl in late November or early December of 1998. [Plaintiff Solano Depo., 44:17-45:1.]

F. Testimony From Senior Staff At Playgirl Who Created The Issue.

21. **Bruce Chew** is Playgirl's President. [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 47.] **Carmine Bellucci** is The Crescent Publishing Group's Senior Vice President, and oversees the creative art and editorial content of *Playgirl*. [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 49.] **Joanne Chiaramonte** was the Art

Director for Playgirl at the time of the January 1999 issue. [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 53.] **Charles Heinrich** is the Design Director for The Crescent Publishing Group and has overall scheduling and layout responsibility for *Playgirl* magazine. [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 56.] **Claire Viguerie Harth** was the Editor-in-Chief for Playgirl at the time the January 1999 issue was published. [Harth Depo., 23:11-17.]

22. Plaintiff Solano heavily relies on the testimony of two former non-managerial Playgirl employees: **Serena Spiezio**, an associate art director who only worked for Playgirl for 3½ months before she was fired; and **Theresa O'Rourke**, an associate editor who only worked there for 14 months. [Landau Decl., ¶ 2, submitted with Playgirl's reply papers.] Neither had the final say as to what went into the issue of the magazine. [Spiezio Depo., 31:7-8.] Chiaramonte, Bellucci, and Harth were the primary decisionmakers as to the content of the cover of the magazine. [Spiezio Depo., 31:7-8; Heinrich Depo., 26:11-23.] The magazine's cover image was normally chosen by Chiaramonte, Bellucci, Harth, and Heinrich. [Chiaramonte Depo., 24:18-25:11; 49:11-50:3.] After Chiaramonte did the initial layout, she submitted it to Bellucci, Heinrich, Harth, and Chew for approval or input. [Chiaramonte Depo., 33:7-11 and 34:24-35:7.] The "associates," and particularly O'Rourke and Spiezio, were not usually involved in selecting the cover image. [Chiaramonte Depo., 55:16-56:8; 57:17-21.] Even Solano omits O'Rourke and Spiezio from the magazine's control group: "Ultimate editorial control over Playgirl is exercised by Bruce Chew, Playgirl's president, and Carmine Bellucci, its senior vice

president." [Solano's Statement of Fact No. 83, submitted to this Court on January 29, 2001.]

23. Bellucci testified that the "TV Guys" headline ("TV Guys – Primetime's Sexy Young Stars Exposed") referred to "hot, up-and-coming stars that were currently appearing on television shows" and that the word "exposed" refers to "reportage," or "journalistic exposure," or possibly a photographic exposure." [Bellucci Depo., 64:23-65:11, 74:3-76:6.] Chiaramonte testified that television actors generally are celebrities. [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 54.] She testified that the "TV Guys" headline meant "TV actors in primetime of course who are attractive with – to me, you know, it's a journalistic story inside", and the word "exposed", as used in that context, to be "a word that journalists/editors use to explain a story, a revealing story." [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 55.] Heinrich testified that the word "exposed" as used on the cover meant "to reveal something about somebody, to explain something, to open something up." [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 58. Harth testified that the "TV Guys" headline conveyed that *Playgirl* would have "sexy pictures and information" about the featured men. She testified that Playgirl's intent was to make a line that was sexy enough where people would be intrigued and want to look inside but not to say something that the magazine was showing something that it did not have. She testified that the editors' goal was to make the cover lines accurate, lively, and communicative about what was in the magazine, and that the editors worked hard to achieve the goal. [Harth Depo., 46:7-48:21, 48:22-53:11.]

24. At the time of publication, Harth did not believe that the "12 Sizzling Centerfolds" headline could be construed to refer to Solano. [Harth Depo., 48:22-49:21.] She testified that the "best body" cover line was simply an identifier. [Harth Depo., 51:4-21.] At the time of publication, Chiaramonte did not believe that a reader would think that the cover lines suggested that Solano was nude inside the magazine. [Chiaramonte Depo., 82:21-86:4.]

25. Spiezio and O'Rourke testified that they thought the use of the word "exposed" could mean nudity and that they did not feel like it was fair to use this language. [Spiezio Depo., 48:8-49:10; O'Rourke Depo. 49:15-50:12, 53:24-54:7, and 54:11-20.] Spiezio testified to her belief that someone reading the banner might expect plaintiff Solano to be nude inside. [Spiezio Depo., 48:8-49:10.]

26. Plaintiff Solano asserts that former, non-managerial employee O'Rourke testified that Playgirl management "blew off" concerns and responded "so what" when confronted about the use of Solano on the cover of the January 1999 issue with the "12 Sizzling Centerfolds" cover line. [Solano's Opposition. Papers, 1:22-2:3, 8:19-21, 25:25-27.] Solano's characterization of Ms. O'Rourke's testimony is misleading and improper.

27. The section of the O'Rourke Deposition on which Solano relies states:

> "Q. Do you in specific remember any discussion at the cover line meeting about the possibility that readers might think that Jose Solano was one of the '12 Sizzling Centerfolds'?
>
> A. I think so. ***I remember I didn't say anything***. I think Christine may have said something. ***But I don't know***. . . . But I

know something was voiced because we'd ***always say*** this is always where the cover subject goes. . . .

Q. And you think it may have been Christine Garcia that said that at this meeting?

A. It may have been, yes. ***But I'm not sure***.

Q. Do you remember if anything was said in response to that sentiment being voiced?

A. That was ***always kind of*** blown off.

Q. Blown off by whom?

A. Carmine. It was just, so what."

[O'Rourke Depo., 58:11-59:6 (emphasis added).]

28. Ms O'Rourke's testimony was nothing more than generalizations about what usually happens during Playgirl meetings. She could not specifically remember anything about the meeting except that she did not make any comments. She thinks something was voiced because they "*always* say this is *always* where the cover subject goes", which is a generalization and not specifically tied to any particular cover line discussion for the January 1999 issue, which specifics she cannot recall in any event. Also, she recalls that their concerns were "*always* kind of blown off" by Bellucci, which is another generalization that cannot be used to support Solano's assertion that Bellucci blew off specific concerns about any particular cover line on the January 1999 issue and the impression that such a line would have on readers.

29. In the section immediately following the cited section, O'Rourke clarified her testimony by explaining

that Bellucci's "so what" comment was not meant to belittle the junior employees' suggestions:

"Q. Did Carmine Bellucci ordinarily in Playgirl cover meetings belittle the suggestion that readers might expect to see the cover man nude inside the magazine because of the cover language?

A. I don't think he was belittling it, like he was just so flippant about it. I just think that he had gotten so used to this was always what we did. So what are we doing. We're not – you know, ***he didn't, really didn't think there was anything wrong with having 12 there next to the body because he didn't think it was suggesting anything***. Whereas, with us, we worked there and we knew that the cover subject always went there. So we, I think, coming into it we were kind of – ***we would overanalyze things*** so . . .

A. . . . I just said that ***we would overanalyze things because we knew that we dealt with this like so methodically***. Here's the cover, subject cover right now. Then we're going to put this. And our features are going to go lower down. ***So we would naturally just say, hey, isn't that going to look strange if we do that. And Carmine would just be like, 'Oh, so what.'*** Okay?"

[O'Rourke Depo., 59:9-60:14 (emphasis added).]

G. Activities Of The Parties Since Publication Of The January 1999 Issue Of *Playgirl*.

30. In January 1999, Solano appeared on the television talk show *Donny & Marie*, on which he conveyed a message to the public that he had not appeared nude in *Playgirl*. [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 60.]

31. Solano has told several television reporters that he did not appear nude in *Playgirl*. [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 61.] Solano has testified that the fact that this lawsuit is going on has "been on the news and certain periodicals," is "common knowledge throughout the industry," and "[i]t's not a secret." Articles on the lawsuit, containing Solano's denial that he had appeared nude in *Playgirl*, were published in November 1999 in the *Daily News* (New York), the *Los Angeles Times*, the *San Antonio Express-News*, *The Record* (New Jersey), in the *City News Service* (Los Angeles), on the *BPI Entertainment News Wire*, and in the *Courthouse News Archive* (in an article titled "Baywatch Star NOT Nude!"). [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 63.] Solano's refutation also ran on the cable news network CNBC in December 1999 ("Jose Solano Jr., the 'Baywatch' star, says he's going to make Playgirl magazine pay for humiliating him."). [Plaintiff Solano's Response to Playgirl's Uncontroverted Fact Statement No. 64.]

II.

CONCLUSIONS OF LAW

A. The Applicable Standard.

1. Federal Rule of Civil Procedure 56(c) provides that a motion for summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 2514 (1986). If the moving party satisfies that burden, the party opposing the motion must set forth specific facts showing that there remains a genuine issue for trial. *Id.*; *see* Fed. R. Civ. P. 56(e).

2. A nonmoving party who bears the burden of proof at trial on an element essential to its case must make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element of the case or be subject to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 2553 (1986). Such an issue of fact is a genuine issue if it reasonably can be resolved in favor of either party. *Anderson*, 477 U.S. at 250-51, 106 S. Ct. at 2511. The non-movant's burden to demonstrate a genuine issue of material fact increases when the factual context renders his claim implausible. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986). Thus, mere disagreement or the bald assertion that a genuine issue of material fact exists no longer precludes the use of summary judgment. *Harper v. Wallingford*, 877 F.2d 728 (9th Cir. 1989); *California Architectural Building Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 987), *cert. denied*, 484 U.S. 1006 (1988).

3. The Court must look to the substantive law at issue to determine which facts are "material." *See Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510. Where a "clear and convincing" evidence requirement applies, as where a factual dispute involves actual malice, "the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Id.*

at 254-55 ("there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence.").

B. Defendant Playgirl's Statute Of Limitations Defense.

4. Playgirl contends that all three of plaintiff Solano's claims for relief are barred by the one-year statute of limitations. In response, plaintiff Solano contends that Playgirl has not met its burden to establish that the statute of limitations bars his claims.

5. There is a one-year statute of limitations for invasion of privacy claims. *See* Cal. Civ. Proc. Code § 340(3). "A defendant raising the statute of limitations as an affirmative defense has the burden of proving the action is time barred." *California Sansome Co. v. U.S. Gypsum*, 55 F.3d 1402, 1406 (9th Cir. 1995). Under the Uniform Single Publications Act, adopted in California, the statue of limitations for defamation or invasion of privacy by false light in a printed publication does not begin to run until the publication is "generally distributed to the public." *Fleury v. Harper & Row Publisheres* [sic], *Inc.*, 698 F.2d 1022, 1027 (9th Cir. 1983).

6. Playgirl states that it mailed the January 1999 issue of *Playgirl* to subscribers on or about November 13, 1998. [Chew Decl., ¶ 22.] It argues that since plaintiff Solano did not file his *Complaint* until November 24, 1999, one year and eleven days after the issue was mailed to subscribers, plaintiff Solano's claims are barred. However, the statute of limitations does not begin to run until the publication was actually sold on newsstands or received by

a substantial majority of its subscribers. *See Osmers v. Parade Publications*, 234 F. Supp. 9824, 926 (S.D.N.Y. 1964) ("What is really determinative is the earliest date on which the libel was substantially and effectively communicated to a meaningful mass of readers – the public for which the publication was intended, not some small part of it."); *McGuiness v. Motor Trend Magazine*, 129 Cal. App. 3d 59, 61 (1982) (on-sale date for newsstand copies of magazine pre-dated filing of lawsuit by more than one year).

7. According to Mr. Chew, Playgirl's President, the January 1999 issue was not scheduled for newsstand display until December 8, 1998, placing plaintiff Solano's filing of the *Complaint* within the statutory period. [Fact No. 20, above.] While Chew claims that copies were "delivered to the post office for mailing on or about November 13, 1998" [*id.*] nothing in the record indicates when a "meaningful mass" of readers received the magazine. Moreover, Chew's statement is contradicted by the testimony of Playgirl's Editor-in-Chief at the time, who places initial distribution in December 1998. [*Id.*] As such, this Court concludes that Playgirl has failed to establish for the purposes of its summary judgment motion that the statute of limitations bars plaintiff Solano's claims for relief as a matter of law.

C. Plaintiff Solano Is A General Purpose Public Figure.

8. Defendant Playgirl contends that plaintiff Solano is a public figure for purposes of having to prove actual malice for an alleged invasion of privacy. Plaintiff Solano contends that he is not. This Court finds that plaintiff

Solano is not a private figure for purposes of the claims asserted by him in this action, is not a limited public figure, but is a general purpose public figure.

9. Public figures are entitled to less protection against defamation and invasion of privacy than are private figures with respect to the publication of false information about them. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997 (1974). A private figure needs to prove that a defendant acted negligently in publishing false information about the individual, while a public figure must prove by clear and convincing evidence that the publication was motivated by actual malice. *Id.*, at 345-46. The distinction between "public figures" and "private figures" was established in *Gertz*, *supra*. The determination of whether plaintiff Solano is a public figure is a question of law. *Rosenblatt v. Baer*, 383 U.S. 75, 88 n.15, 86 S. Ct. 669, 677 n.15 (1966). Defendant Playgirl bears the burden of proof to establish that plaintiff Solano is a public figure. *See Lerman v. Flynt Distributing Co.*, 745 F.2d 123, 136 (2d Cir. 1984).

10. The public figure distinction is broken down into two categories – general purpose public figures and limited public figures. *See Gertz*, 418 U.S. at 351.

- **Plaintiff Solano is not a limited public figure.**

11. A limited public figure refers to an individual who voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. *See id.* Playgirl contends that plaintiff Solano has injected himself into several public controversies, all of which are addressed, at least incidentally, in the

"TV Guys" article. Playgirl argues that Solano thrust himself into the public debate about whether television is worth watching. This Court disagrees.

12. Playgirl has offered no evidence of any public debate on this issue and has shown no proof that plaintiff Solano in any way tried to influence the outcome of such a public controversy. Playgirl attempts to persuade this Court that the "TV Guys" article debates whether television is worth watching. The content of the article, however, offers no such debate. Playgirl cannot rely on the assertion that television viewing may generally be a topic of "public debate." Courts have rejected such a position. *See Wolston v. Reader's Digest Association*, 443 U.S. 157, 167, 99 S. Ct. 2701 (1979) (reversing summary judgment: "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention"); *Rancho La Costa, Inc. v. Superior Court*, 106 Cal. App. 3d 646, 658 (1980) (resort reportedly liked [sic] to organized crime not a public figure, despite public interest in fighting organized crime). Thus, this Court concludes that plaintiff Solano is not a limited public figure as a matter of law.

- **Plaintiff Solano is a general purpose public figure.**

13. A general purpose public figure refers to an individual who has achieved such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. *See Gertz*, 418 U.S. at 351. Defendant Playgirl contends that plaintiff Solano's role as a series regular over a period of years on a show garnering 1.6 billion viewers worldwide must qualify him as a general

purpose public figure. By contrast, Solano argues that working actors are not automatically general purpose public figures. He asserts that he is not a household name recognized by a large percentage of the relevant population and that even Playgirl's witnesses admit that they did not know him before working on this issue.

14. This Court concludes that plaintiff Solano is a general purpose public figure. While this Court agrees with Solano that working actors are not automatically general purpose public figures, courts often have found that there is a public interest that attaches to people who by their professional calling, such as actors, create a legitimate and widespread attention to their activities. Thus, the actions of such public figures may legitimately be mentioned and discussed in print or on radio or television. As has been stated: "A person may, by his own activities or by the force of circumstances, become a public personage and thereby relinquish a part of his right of privacy to the extent that the public has a legitimate interest in his doings, affairs, or character." *Werner v. Times-Mirror Co.*, 193 Cal. App. 2d 111, 117 (1961). Plaintiff Solano has become such a public person.

15. Plaintiff Solano was a series regular on the *Baywatch* televisions show from 1996 to 1999. [Fact No. 2, above.] *Baywatch* reaches 140 countries and is broadcast in 32 languages to a total of more than 1.6 billion people around the world. [Fact No. 7, above.] Solano himself stated that "[i]t blows [his] mind how many people watch that show." [*Id.*] Plaintiff Solano was elected "1994's Young and Modern Man" by *YM* magazine, a nationwide magazine targeted to a teenage audience. [Fact No. 4, above.] While he starred on *Baywatch*, Solano made a guest appearance on a network sitcom, *Caroline in the City*. [*Id.*]

Since leaving *Baywatch*, he has acted in two films and a television series. [*Id.*] He has been interviewed and has appeared in *The Oprah Winfrey Show*, *Donny & Marie*, *Vibe*, *The Gong Show*, *Extra*, and *Entertainment Tonight*, and has appeared in *People*, *GQ*, *Cosmopolitan*, *Latin Style* and *Competitor* magazines, and on the cover of *Fitness Swimwear* magazine. [*Id.*] Plaintiff Solano has appeared in commercials for WRIGLEY's™ gum and PEPSI.™ [*Id.*] He regularly participates in charity events as a "celebrity participant." [*Id.*]

16. It is not a persuasive argument that plaintiff Solano does not consider himself a celebrity or that some people, including come of Playgirl's employees, do not recognize him. This Court doubts that all public figures are recognized by everyone or consider themselves celebrities. Plaintiff Solano relies on the case of *Harris v. Quadracci*, 856 F. Supp. 513, 516 (E.D. Wisc. 1994), wherein the district court held that the plaintiff was not a public figure even though she was an actress/model who appeared in television and nationally distributed motion pictures and posed nude in *Playboy* magazine. However, in *Harris*, the district court did not set forth any reasoning in support of its determination. Rather, the court summarily stated, "[T]his is not quite enough, in my view, to make her a public figure for all purposes." *See id.* at 517. Thus, this Court cannot find that the reasoning of that non-binding district court case is persuasive here. Instead, this Court is persuaded by case law from other jurisdictions that supports the notion that actors and entertainers are public figures. *See, e.g., Carlisle v. Fawcett Publications, Inc.*, 201 Cal. App. 2d 733, 746-47 (1962) (labeling as "public figures" actors and actresses, professional athletes, public officers, noted inventors, explorers and war heroes);

Douglass v. Hustler Magazine, Inc., 769 F.2d 1128, 1141 (7th Cir. 1985) ("Entertainers can therefore be public figures for purposes of a publisher's . . . First Amendment defense to a charge of false-light invasion of privacy."); *Man v. Warner Bros., Inc.*, 317 F. Supp. 50 (S.D.N.Y. 1970) (referring to the plaintiff's "frivolous" contention that an entertainer, performing on a stage before 400,000 people, is not a public figure). This Court agrees with these determinations. The evidence set forth above and on record with this Court establishes that plaintiff Solano is a public figure.

17. Finally, it is worth mentioning that plaintiff Solano has had opportunities to refute Playgirl's use of his photograph on the cover and in the article of the January 1999 issue and has done so. In January 1999, plaintiff Solano appeared on the television show *Donny & Marie*, on which he conveyed a message to the public that he had not appeared nude in *Playgirl*. [Fact No. 30, above.] Plaintiff Solano has told several television reporters that he did not appear nude in *Playgirl*. [Fact No. 31, above.] He denied that he had appeared nude in *Playgirl* in several news articles, such as the *Daily News* (New York), the *Los Angeles Times*, in the *City News Service* (Los Angeles), on the *BPI Entertainment News Wire* and in the *Courthouse News Archive*. [*Id.*] Plaintiff Solano's refutation also ran on the cable news network CNBC in December 1999. [*Id.*] While this evidence is not dispositive that plaintiff Solano is a public figure, it supports one of the underlying bases for reduced First Amendment protection for public figures – that a public figure has greater access to media channels to dispute false information about him. *See Gertz*, 418 U.S. at 344-45.

18. Based on the foregoing, this Court concludes that plaintiff Solano is a general purpose public figure as a matter of law.

D. Defendant Playgirl Is Entitled To Summary Judgment On Plaintiff Solano's Third Claim For Relief, For False Light Invasion Of Privacy.

19. In his third claim for relief, plaintiff Solano alleges a claim for false light invasion of privacy.

20. To prevail on this claim, plaintiff Solano must show: (1) that Playgirl disclosed to one or more persons information about or concerning plaintiff Solano which was presented as factual but which is actually false or created a false impression about him; (2) that the information was understood by one or more persons to whom it was disclosed as stating or implying something highly offensive that would have a tendency to injure his reputation; (3) by clear and convincing evidence that Playgirl acted with constitutional malice; and (4) that he was damaged by the disclosure. *See Fellows v. National Enquirer, Inc.*, 42 Cal. 3d 234, 238-39 (1986).

21. Defendant Playgirl contends that summary judgment is warranted because plaintiff Solano cannot meet his burden of proof on any of these elements.

- **Plaintiff Solano cannot show that defendant Playgirl disclosed information concerning Solano that created a false impression about him.**

22. Playgirl argues that it is not sufficient for plaintiff Solano to claim that Playgirl put him in a false light solely by putting him on the cover of the magazine.

23. Plaintiff Solano does not disagree that the photographs of him and the accompanying text of the January 1999 issue are true. [Fact No. 16, above.] Rather, he contends that the false implication that a plaintiff is voluntarily associated with a distasteful or obscene magazine and posed nude is a recognized basis for this claim. He asserts that the use of his photograph without his consent to promote a pornographic magazine is indecent and highly offensive to the ordinary person. Plaintiff Solano argues that defendant Playgirl conveyed the false impression by surrounding his photograph with these intentionally misleading headlines: "Primetime's Sexy Young Stars Exposed," "12 Sizzling Centerfolds Ready to Score With You," "Hot Celebrity Buns," and "Baywatch's Best Body Jose Solano."

24. This Court agrees with defendant Playgirl that it is not sufficient for plaintiff Solano to claim that it put him in a false light solely by putting him on the cover of an explicit magazine. Playgirl cites to the case of *Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527 (9th Cir. 1984), which this Court finds is analogous to the situation before this Court. In *Brewer*, the plaintiff created a photograph that simulated him shooting himself through the head. *See id.* at 528. He entered into an agreement for the commercial sale of the photograph in the form of a postcard. *See id.* Hustler subsequently reproduced a portion of the postcard

in its magazine. *See id.* The plaintiff sued *Hustler* magazine for violating his privacy by publishing his non-nude photograph in the sexually explicit magazine. The Ninth Circuit affirmed the dismissal of his claim, stating that "this argument is without merit because Brewer had no right to choose the forum in which his photograph was displayed." *See id.* at 530. Similarly, here, plaintiff Solano asserts a violation of his privacy by the publishing of his photograph in what he terms a "distasteful or obscene magazine." Plaintiff Solano attempts to distinguish *Brewer* by stating that there was no allegation that the plaintiff in *Brewer* was cast in a light that implied nudity, sexual content, or voluntary association with *Hustler*. While the *Brewer* plaintiff might not have worded his allegation in an identical manner as plaintiff Solano here, the basis for the false light claims are essentially the same – publication of his photographs in a magazine with sexual content objectionable to the plaintiff. As such, the Ninth Circuit's reasoning in *Brewer* is applicable here – plaintiff Solano, a public figure, unfortunately has no right to choose the forum in which his republished photograph is displayed especially when plaintiff Solano consented to the use and sale of his photographs in commercial photo stock houses.

25. The *Brewer* court cited to another case, *Ann-Margret v. High Society Magazine, Inc.*, 498 F. Supp. 401 (S.D.N.Y. 1980), wherein the court rejected the plaintiff's right to privacy claim, noting that once a person has sought publicity, like the actress filing the lawsuit, "he cannot at his whim withdraw the events of his life from public scrutiny." *See id.* at 405. This reasoning is equally applicable here. While plaintiff Solano wishes otherwise, once he became part of an extremely popular television series and participated in the events and opportunities

associated with it, he relinquished a certain amount of control over the publication of events of his life.

26. Plaintiff Solano argues that *Ann-Margret* is distinguishable because there was no implication of voluntary association, and the magazine was not offensive, merely "tacky." This Court disagrees. The plaintiff in *Ann-Margret* "violently object[ed]" to [the photograph's] inclusion in such a format." *See id.* at 404. The format was characterized by the plaintiff as "hard core pornography." *See id.* at 403. Furthermore, the *Ann-Margret* court's description of the magazine as "merely tacky" versus "offensive" is not significant. Indeed, this Court doubts that the court in *Ann-Margret* would have reached a different conclusion even if it had found that the magazine was "offensive." Rather, the court found that the use of a person's name or picture in the context of an event within the "orbit of pubic interest and scrutiny" can rarely form the basis for an actionable privacy claim. *See id.* at 405.

27. In arguing that he can sustain a false light claim, plaintiff Solano relies on the case of *Douglass v. Hustler Magazine*, 769 F.2d 1128, 1135 (7th Cir. 1985), wherein the plaintiff asserted a false light claim because Hustler "insinuate(d] that she is the kind of person willing to be shown naked in Hustler." *Id.* at 1135. The Seventh Circuit determined that this insinuation could form the basis of a false light claim, relying on the degrading setting of the magazine. *See id.* at 1135-36. While this Court acknowledges that the *Douglass* holding arguably could support plaintiff Solano's claim here, this Court finds that the decision in *Brewer* is more well-reasoned and controls the determination before this Court as binding Ninth Circuit precedent. Moreover, in reaching its determination, the Seventh Circuit in *Douglass* found it

significant that the nude photographs of plaintiff had not been published before. It stated that "[i]f a photograph has been published previously the implied representation that its present publication is with the consent of the subject is weakened." *See id.* at 1136. Such is the case here.

28. Plaintiff also relies on *Braun v. Flynt*, 726 F.2d 245, 256 (5th Cir. 1984), wherein the court found that the plaintiff had established a false light claim based on evidence that the defendant placed the plaintiff's picture in a magazine devoted to the publication of lewd pictures of women and to sexual exploitation. *See id.* at 254. However, this Court finds that plaintiff Solano's reliance on this case is misplaced. First, this Court notes that the *Braun* court found that the plaintiff was not a public figure. *See id.* at 250. Moreover, as argued by defendant Playgirl, a subsequent decision in that same circuit noted that *Braun* did not hold that the plaintiff was placed in a false light merely because she objected to the contents of the magazine. *See Faloona v. Hustler Magazine, Inc.*, 607 F. Supp. 1341, 1356 (N.D. Tex. 1985). As the court stated:

> "If the Braun panel had intended to hold this, it would have been obligated to distinguish – or to disapprove – numerous cases which hold that there is no right of privacy action merely because a person's photograph or name appears in a magazine whose content is objectionable to that person. *See, e.g., Ann-Margaret v. High Society Magazine, Inc.*, 498 F. Supp. 401 (S.D.N.Y. 1980); *Faucheux v. Magazine Management*, 5 Media L. Rptr. 1697 (E.D. La.1979); *Falwell v. Penthouse International, Ltd*, 521 F. Supp. 1204 (W.D. Va. 1981); *Handelman v. Hustler Magainze*, 469 F. Supp. 1053 (S.D.N.Y. 1979); *Goelet v. Confidential, Inc.*, 5 A.D.2d 226, 171 N.Y.S.2d 223 (1958).

> As stated in *Handelman*: 'But magazines with sexually explicit text and photographs of genitalia are part of our contemporary scene. Successful candidates for the presidency of the United States consent to interviews in magazines of the same genre as Hustler. We think that Plaintiff is not entitled to damages merely because there is an oblique reference to him in a magazine which he believes to be in bad taste.' (469 F. Supp. at 1060)."

See id. at 1357 n.48.[1]

29. Thus, in light of the foregoing, this Court concludes that plaintiff Solano has failed to establish a genuine issue of material fact that defendant Playgirl's use of his photographs created a false impression. Consequently, because plaintiff Solano cannot establish an essential element, his claim for relief for invasion of privacy – false light fails as a matter of law.

- **Plaintiff Solano cannot show actual malice.**

30. This Court notes that it does not need to reach the element of actual maliee since plaintiff Solano has failed to satisfy his burden with respect to the false impression element. Nonetheless, this Court briefly addresses the parties' arguments regarding actual malice because this Court further concludes that plaintiff Solano cannot carry his burden with respect to this element.

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[1] The *Faloona* opinion was affirmed in *Faloona v. Hustler Magazine, Inc.*, 799 F.2d 1000 (5th Cir. 1986).

31. Defendant Playgirl argues that plaintiff Solano cannot prove that Playgirl acted with actual malice with regard to the alleged false implication. Playgirl's senior staff who supervised the creation of the January 1999 issue testified that they believed either that Solano was a celebrity or that any television actor or personality was a celebrity and that the issue of the word "exposed" on the cover had a journalistic meaning and referred to a story that revealed something about its subjects. [Fact No. 23, above.] Plaintiff Solano, on the other hand, contends that the record contains ample evidence that Playgirl published the photograph of Solano and its accompanying headlines with actual malice – knowledge that it was conveying a false impression, or reckless disregard for truth or falsity.

32. This Court has concluded as a matter of law that plaintiff Solano is a public figure. As such, both parties agree that Solano must show that Playgirl published the photograph of Solano and accompanying headlines with actual malice – knowing or reckless falsehood. *See Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 424 (1983). The burden is on the plaintiff to affirmatively establish by clear and convincing evidence that a genuine issue of fact exists as to whether actual malice can be proven at trial. *See Aisenson v. ABC, Inc.*, 220 Cal. App. 3d 146, 154 (1990). As stated in *Aisenson*:

> "Reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serous doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."

See id. at 160; *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 1325 (1968). "The question of whether the evidence in the record . . . is sufficient to support a finding of actual malice is a question of law." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 658, 109 S. Ct. 2678 (1989).

33. Playgirl, of course, points to the testimony of its editors that they had no subjective doubts in using the photographs of plaintiff Solano. [Fact Nos. 23 and 24, above.] While this evidence is probative, this Court is mindful of what the Ninth Circuit has stated: "[W]e have yet to see a defendant who admits to entertaining serious subjective doubt about the authenticity of an article it published[.]" *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249, 1253 (9th Cir. 1997). In any event, this Court must look to whether plaintiff Solano has presented sufficient evidence from which a jury could find that Playgirl has published with actual malice. In his claim of actual malice, plaintiff Solano relies exclusively on testimony from Serena Spiezio, an associate art director, and Theresa O'Rourke, an associate editor. [Fact No. 22, above.] Ms. Spiezio and Ms. O'Rourke testified that they thought the use of the word "exposed" could mean nudity and that they did not feel like it was fair to use this language. [Fact No. 25, above.] However, as mentioned above, plaintiff Solano offers no evidence that any senior editor at Playgirl who had the final say as to what went into the issue entertained any serious doubts as to whether the publication was misleading. [Fact Nos. 21-24, above.] Moreover, neither Ms. Spiezio nor Ms. O'Rourke testified that concerns over use of plaintiff Solano's image in a misleading manner were raised and rejected by senior editors. In fact, Ms. Spiezio testified to her belief that someone reading the

banner might expect plaintiff Solano to be nude inside. [Fact No. 25, above.] This belief only guesses at what a bystander might think and does not address the subjective beliefs of Playgirl's editors. Plaintiff Solano also states that when concerns about the false impression were raised, they were "blown off" by Bellucci; "[i]t was just, so what." [Fact No. 26, above.] However, Playgirl objects to, and seeks to strike, the recitation of this testimony on the basis that it is misleading and improper. Playgirl's objection is well taken. When viewed in context, Ms. O'Rourke did not remember saying anything specific about the headline's implication that plaintiff Solano would be a centerfold; she thought that maybe someone had voiced something, but she was not sure. She also stated generally that concerns were "always kind of blown off." However, she offers no specifics about the 1999 January issue. [Fact Nos. 26-29, above.] In light of the above, this Court concludes that this evidence is not sufficient to support a finding of actual malice as a matter of law.

E. Defendant Playgirl Is Entitled To Summary Judgment On Plaintiff Solano's First Claim For Relief, For Statutory Misappropriation Of Right To Publicity.

34. In his first claim for relief for statutory misappropriation of his right to publicity, plaintiff Solano alleges injury stemming from the use of two photographs of him in the January 1999 issue.

35. California Civil Code section 3344 ("Section 3344") provides a cause of action for damages when any "person . . . knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods . . . without such person's

prior consent. . . ." However, under Section 3344(d), there is no relief for uses "in connection with any news, public affairs, sports broadcast or account. . . ." It is under this section that defendant Playgirl asserts its defense and seeks summary judgment as to the first claim for relief. Specifically, it argues that both photographs were used in connection with a news or public affairs account about television celebrities. It concludes that Playgirl's truthful, newsworthy use of the photographs of plaintiff Solano provides a complete defense to plaintiff Solano's statutory misappropriation claim.

36. This Court agrees with Playgirl that its use of the photographs of plaintiff Solano is protected under Section 3344(d). The statute protects matters of public interest and about public affairs. Indeed, "public affairs" means "something less important than news" and includes things that "may not even be important, but are of interest." *Dora v. Frontline Video, Inc.,* 15 Cal. App. 4th 536, 543 and 545 (1993). As stated by the Supreme Court, "Entertainment itself can be important news." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578, 97 S. Ct. 2849, 2859 (1977). The United States Supreme Court, explaining the "public interest" privilege in a privacy context, stated: "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press." *Time, Inc. v. Hill*, 385 U.S. 374, 388, 87 S. Ct. 534, 542 (1967).

37. Here, plaintiff Solano appeared in one of the most-watched television shows in the world. [Fact No. 7, above.] Certainly, photographs of him used in connection with a public affairs account about television celebrities in

general and about his life in specific are newsworthy. As stated by one court, "[T]he accomplishments and way of life of those who have achieved a marked reputation or notoriety by appearing before the public such as actors . . . may legitimately be mentioned and discussed in print or on radio or television. Such public figures have to some extent lost the right of privacy. . . ." *Carlisle v. Fawcett Publications, Inc.*, 201 Cal. App. 2d 733, 746-47 (1962); *see also Lerman v. Flynt Distributing Co. Inc.*, 745 F.2d 123, 137-38 (2d Cir. 1984) (an article including nude pictures of a celebrity is unquestionably "within the broad definition of a newsworthy matter or a matter of public interest").

38. Plaintiff Solano argues that the Section 3344(d) exemption does not apply when a party uses the name or likeness of another in a knowingly false manner and that triable issues of fact exist with respect to this issue. In making this argument, plaintiff Solano relies on the same evidence discussed above with respect to the actual malice inquiry. However, as found above, plaintiff Solano's evidence is insufficient to support a finding of a knowing or calculated falsehood.

39. Thus, in light of the foregoing, this Court concludes that defendant Playgirl has established a defense to plaintiff Solano's claim under Section 3344. As such, Playgirl's publication of the photographs of Solano is not a use for which consent is required under Section 3344, and plaintiff Solano's first claim for relief fails as a matter of law.

F. Defendant Playgirl Is Entitled To Summary Judgment On Plaintiff Solano's Second Claim For Relief, For Common Law Commercial Misappropriation.

40. In his second claim for relief for common law invasion of privacy – misappropriation of likeness, plaintiff Solano alleges that defendant Playgirl made unauthorized use of his name, likeness, and right of publicity.

41. Under common law commercial misappropriation invasion of privacy, plaintiff Solano must establish: (1) defendant's use of plaintiff's identity; (2) appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury. *See Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 413-14 (9th Cir. 1996). Defendant Playgirl seeks summary judgment as to this cause of action proffering the same defense as it does under Section 3344 – that Playgirl's use of plaintiff Solano's name and photographs of him is a protected news and public interest account. Plaintiff Solano correspondingly offers the same argument as above – that the use of an actor's name and photograph in a magazine is not protected by any such privilege where the use entails "a calculated falsehood."

42. For the same reasons discussed above with respect to the statutory misappropriation claim, this Court concludes that plaintiff Solano's common law commercial misappropriation claim fails as a matter of law. The common law "public interest" protection is synonymous with the Section 3344 "public affairs" protection. *See Dora*

v. Frontline Video, Inc. (1993) 15 Cal. App. 4th 536, 545-46.[2]

G. Attorneys' Fees And Costs.

43. Defendant Playgirl is entitled to an award of its attorneys' fees and costs incurred in defense of plaintiff Solano's First Claim For Relief asserted in his *Complaint*, for alleged misappropriation of right of publicity under California Civil Code § 3344(a), in an amount to be fixed by the Court after presentation of additional evidence pursuant to California Civil Code § 3344(a), last sentence ("The prevailing party in any action under this section shall also be entitled to attorney's fees and costs.") and Fed. R. Civ. P. 54(d)(2).

44. Defendant Playgirl is entitled to an award of its costs in an amount to be fixed by the Court after presentation of additional evidence pursuant to Fed. R. Civ. P. 54(d)(1) and this Court's Local Rule 16.

H. Conclusion.

45. In sum, plaintiff Solano is a public figure, and consequently, he receives less protection against invasion of his privacy with respect to the publication of arguably false information about him. The First Amendment reduction of protection for public figures came about for two reasons: (1) a public figure has greater access to media channels to dispute false information about him; and (2) a

[2] Based on the foregoing conclusions, this Court does not need to reach the issue of damages as raised by Playgirl.

public figure has, in voluntarily entering public life, agreed to subject his actions to greater scrutiny, and accordingly needs less protection from harm by the State. *See Gertz*, 418 U.S. at 344-45. Undoubtedly, plaintiff Solano is unhappy and embarrassed about the appearance of his picture in *Playgirl*, and this Court sympathizes with his feelings.[3] However, his dislike of the manner in which he is portrayed or the magazine in which his picture is reproduced and his proclaimed embarrassment and negative reaction he has felt over the reproduction do not provide a basis for the claims he asserts. To find otherwise would lead to self-censorship and chill the exercise of the freedom of speech, both of which are forbidden results under the First Amendment.

46. Accordingly, this Court grants defendant Playgirl, Inc.'s Motion for Summary Judgment Against Plaintiff on All Claims.

Dated: February 27, 2001

/s/ Dickran Tevrizian
THE HONORABLE DICKRAN TEVRIZIAN, JUDGE OF THE UNITED STATES DISTRICT COURT

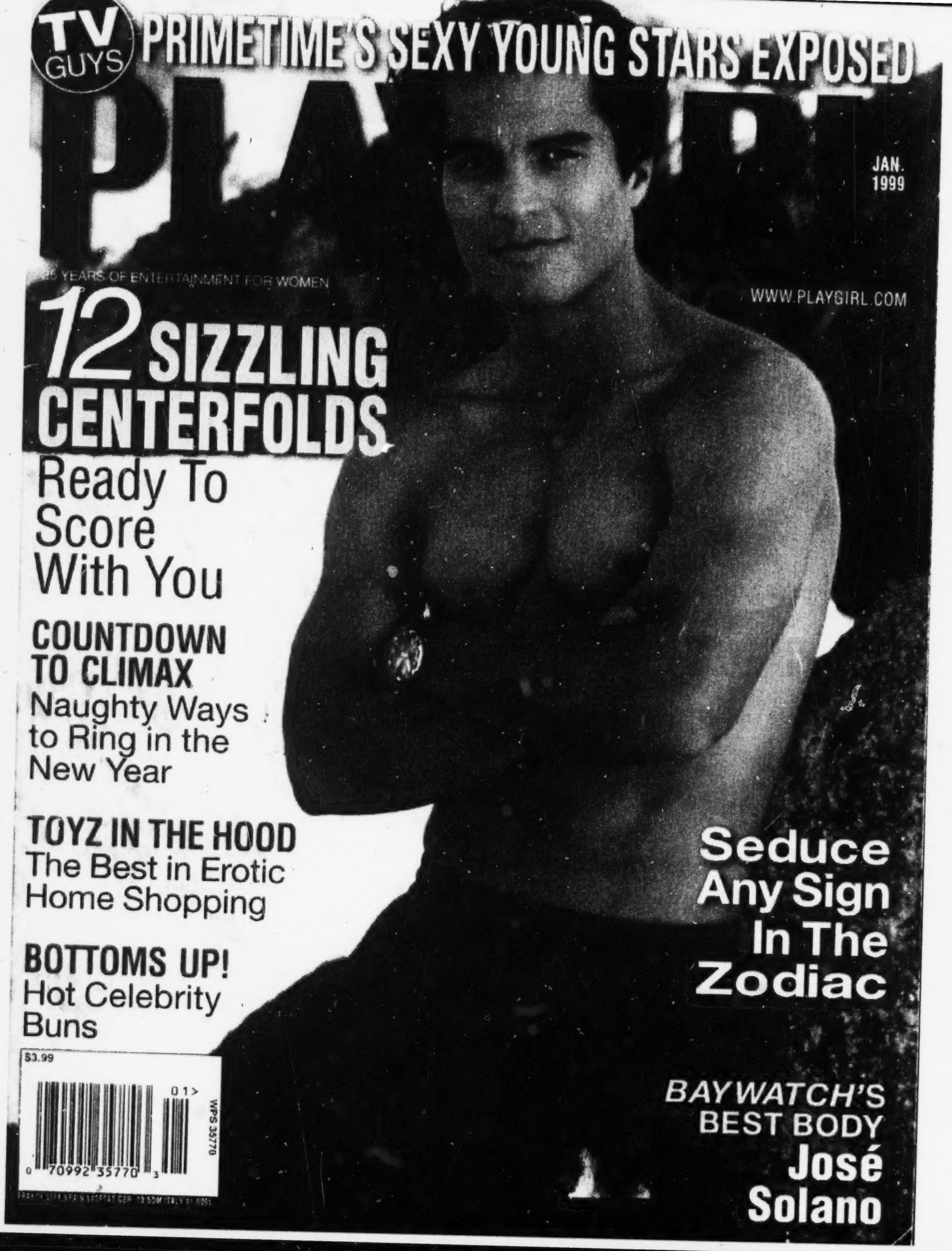
---

[3] Indeed, this Court is aware that judges are often deemed limited purpose public figures, and as such, could find themselves cover models for these same types of publications which may be part of the contemporary scene but could be potentially embarrassing nonetheless.

Presented by:

SHEPPARD, MULLIN,
RICHTER & HAMPTON LLP
KENT R. RAYGOR
AMY JOHNSON HARRELL

By: /s/ Kent R. Raygor 20 FEB 01
KENT R. RAYGOR
Attorneys for Defendant
PLAYGIRL, INC.


TV GUYS
PRIMETIME'S SEXY YOUNG STARS EXPOSED
PLAYGIRL
JAN. 1999
35 YEARS OF ENTERTAINMENT FOR WOMEN
WWW.PLAYGIRL.COM
12 SIZZLING CENTERFOLDS
Ready To Score With You
COUNTDOWN TO CLIMAX
Naughty Ways to Ring in the New Year
TOYZ IN THE HOOD
The Best in Erotic Home Shopping
BOTTOMS UP!
Hot Celebrity Buns
Seduce Any Sign In The Zodiac
BAYWATCH'S BEST BODY
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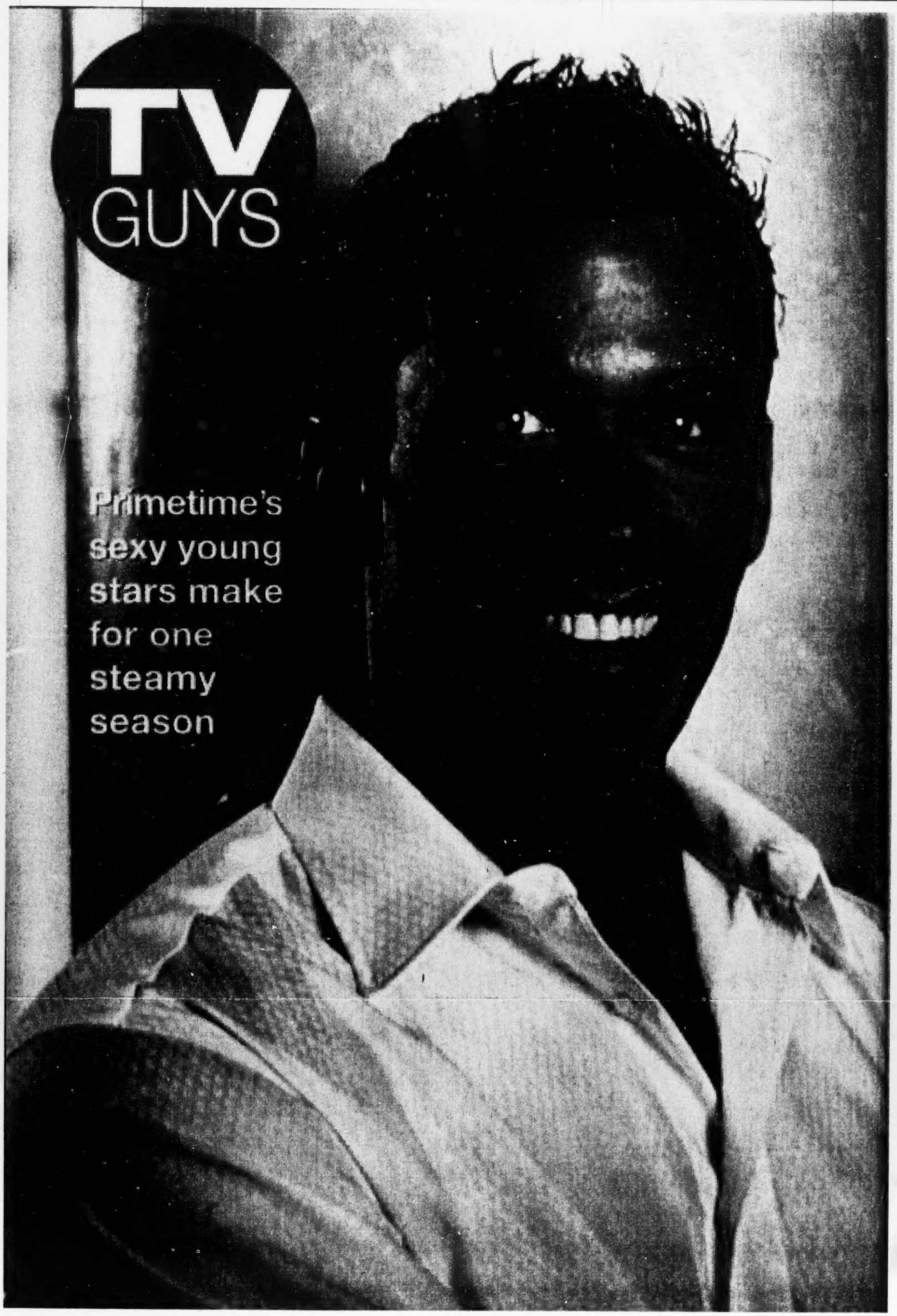
APPENDIX E


TV
GUYS
Primetime's
sexy young
stars make
for one
steamy
season

This television season boasts so many small screen sizzlers that there's no hotter place to be each night than couchbound, surfing the tube. With each show's stud even sultrier than the next, you won't want to miss PLAYGIRL's picks for the ultimate lusty lineup.

TV GUYS

Dan Cortese

9:30PM
NBC **_Veronica's Closet_**

2 4 **In Character:** As Perry, underwear-model-turned-publicist on NBC's *Veronica's Closet*, Cortese plays "the luckiest man in America," says the hunky Virgo. "He's single, makes a lot of money and works with women in lingerie every day."

5 7 **Past Lives:** While laboring as a production assistant for MTV, Dan jokingly told a talent executive that he was the best candidate to host the channel's new show *MTV Sports*. One screen test later, a star was born.

9 11 **From Jock To Thespian:** Making the jump from host to actor, Pittsburgh native Dan starred in several TV movies, television series (*Traps* and *The Single Guy*) and feature films, including *Demolition Man* and *A Weekend In The Country*.

11 13 **Golf Stud:** Dan's passion for sports isn't limited to the small screen. In his spare time, Cortese enjoys playing basketball and golf, and attended the University of North Carolina on a football scholarship.

José Solano

IN SYNDICATION **_Baywatch_**

2 4 **In Character:** As the first luscious Latino cast member on *Baywatch*, José plays Manny Gutierrez, an ambitious rookie who uses lifeguarding as his ticket out of the barrio.

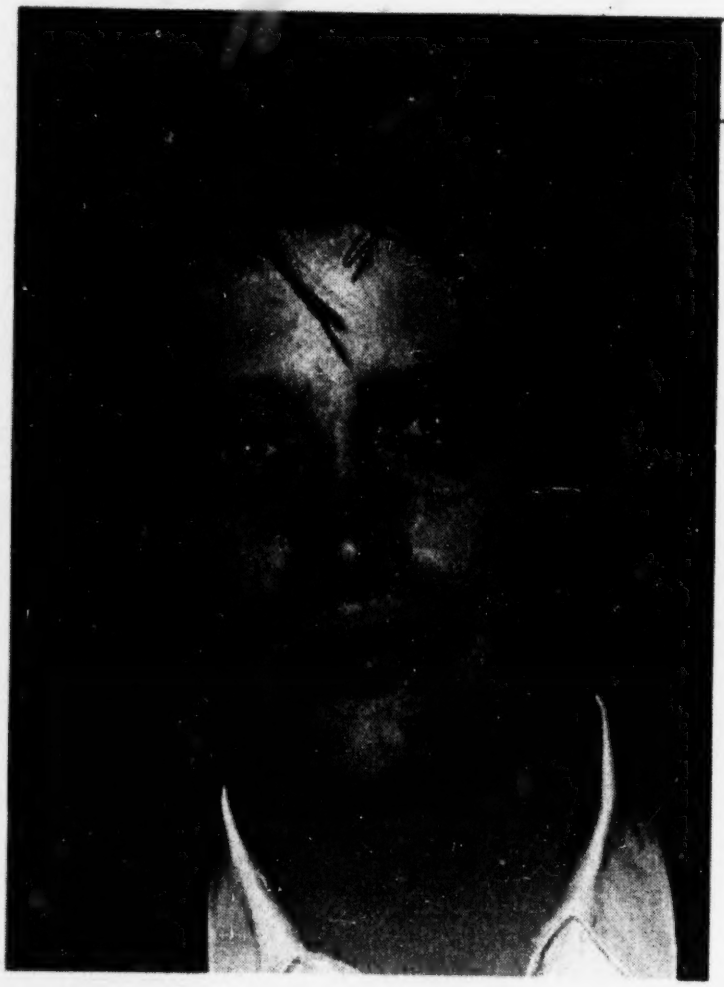
5 7 **Past Lives:** Before slipping into those world famous red trunks, José clinched top honors in several modeling competions and was voted "Man Of The Year" by *YM Magazine*.

9 11 **Macho, Macho Man:** José didn't always spend his days frolicking on the beach with fake-boobed babes. The versatile stud is a junior Olympic soccer champion, a former U.S. Navy medic and a Desert Storm veteran.

13 15 17 **A Role Model...in Swimtrunks:** "With two younger brothers, I have always tried to be a positive role model and hope that with my role on *Baywatch*, I will be able to encourage others to go for their dreams."

19 20

TV GUYS



Matt LeBlanc

8:00PM NBC ***Friends***

2 4 **In Character:** As the dopey but drop-dead gorgeous Joey on NBC's tried-and-true comedy *Friends*, Matt has legions of female fans lusting to move from platonic to romantic.

5 7 **Past Lives:** The trained carpenter launched his acting career with commercials for Levi's 501 jeans. After nailing guest-starring parts on *Married...with Children*, he nabbed leading movie roles, including last year's *Lost in Space*.

9 11 13 **Mama Said Knock You Out:** Don't even think about dating this magnificent mutt of Irish, Italian and French descent without getting the seal of approval from mommie dearest, whom he dubs "his best friend."

15 17 19 **Secret Nickname:** Although Matt plays an airhead on primetime, according to a feisty former gal pal, this heartthrob knows how to use his *other* head. Matt had such brain power below the belt, she tagged him "Matt LeBonk."

David Boreanaz

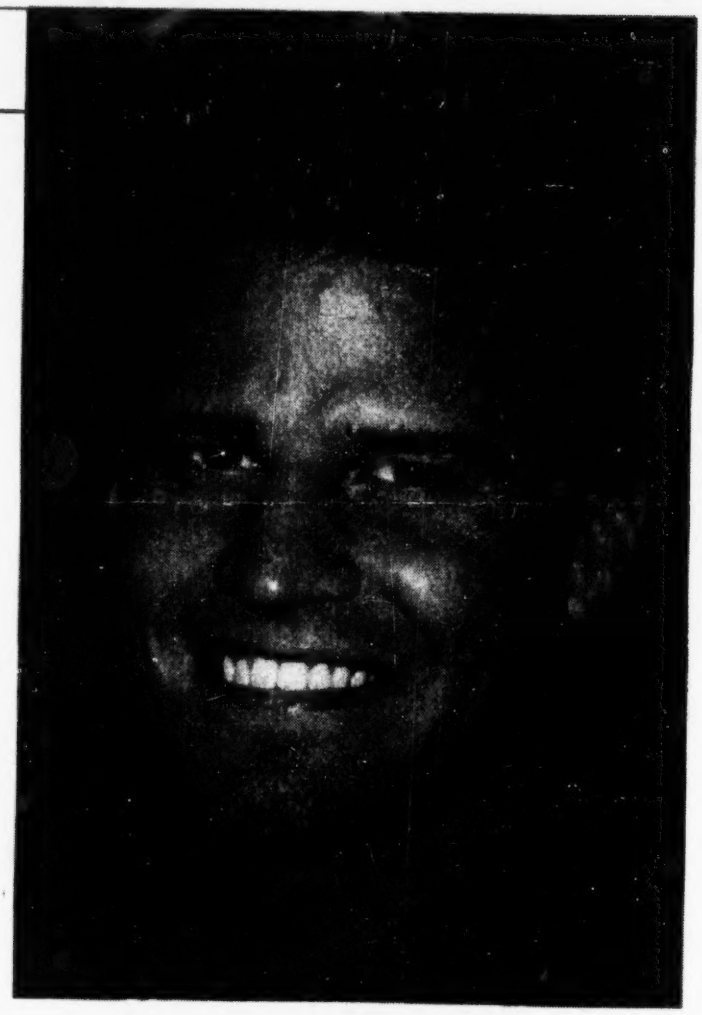
8:00PM WB ***Buffy The Vampire Slayer***

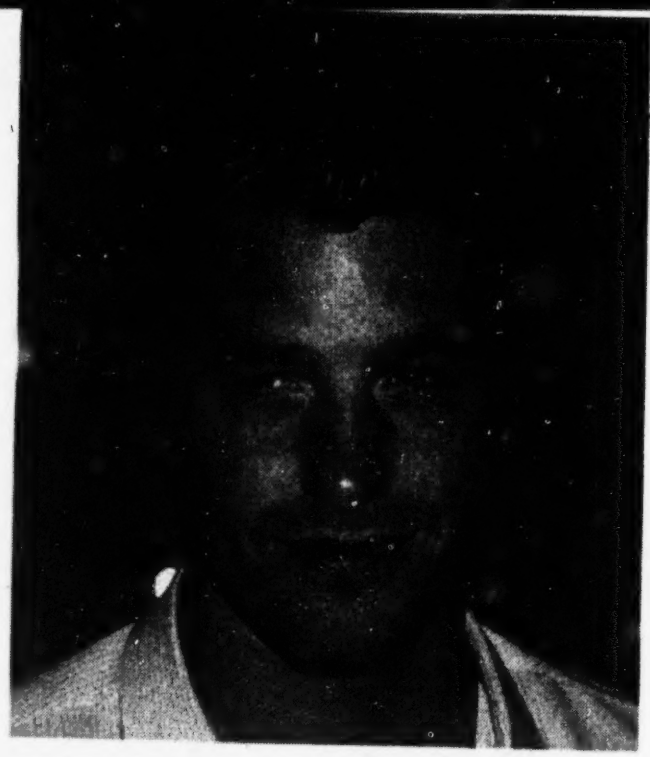
2 4 **In Character:** David's sexy charm as brooding bloodsucker, Angel, on *Buffy The Vampire Slayer* has earned him his own spin-off series slated to debut this fall.

5 7 **Past Lives:** Though he's a relative newcomer to the small screen, 27-year-old David has become the beast most women *want* creeping into their bed at night.

9 11 13 **A Delicious Discovery:** Before his *Buffy* breakthrough, David was a starving actor who got by parking cars and handing out towels at a sports club. But finally, while walking his dog in Hollywood, a keen-eyed manager spotted David's magnetic looks and instantly signed him as a client.

15 17 19 **He's No Al Roker:** Though a noble profession, we're glad David didn't follow in his father's footsteps and become a weatherman. A hottie like Dave is built to give more than today's forecast.





Scott Speedman

9:00PM
WB
Felicity

2 4 5 **In Character:** On *Felicity*, Scott plays Ben Covington, the flaxen-haired object of the title character's affection. Armed with a set of dazzling peepers, Ben unwittingly lures Felicity away from her life-long plans of studying medicine to attend his college in New York. Dis Stanford to follow a hot stud? Sounds reasonable to us.

7 **Past Lives:** Before hitting primetime, Scott starred in indie flicks *Can I Get A Witness* and *Kitchen Party*.

9 11 **Oh Canada!:** In 1992, as a member of the Canadian Junior National Swim Team, Scott put his hard body to good use, performing at the Olympic Trials.

13 **Boy Wonder:** Scott was first noticed by showbiz execs when he wowed them at an audition for the part of Robin in *Batman Forever*.

Rob Estes

8:00PM
FOX
Melrose Place

2 4 **In Character:** Playing sassy restaurateur on the ultra-hot *Melrose Place*, Rob really knows how to *dish out* the goods on primetime's steamiest address.

5 7 **Past Lives:** Many female tube queens have *copped* a feel of the chiseled-featured star on USA network's *Silk Stalkings*, where he played Sergeant Chris Lorenzo. Now that's someone to stand at attention for!

9 11 **Reality Bites:** Life off the set for this family-minded fella is miles away from his endless cavorting on primetime. Sorry ladies, but he's been married to his *Melrose* co-star Josie Bissett for five fabulous years. Aw, shucks...isn't that always the way?

Duane Martin

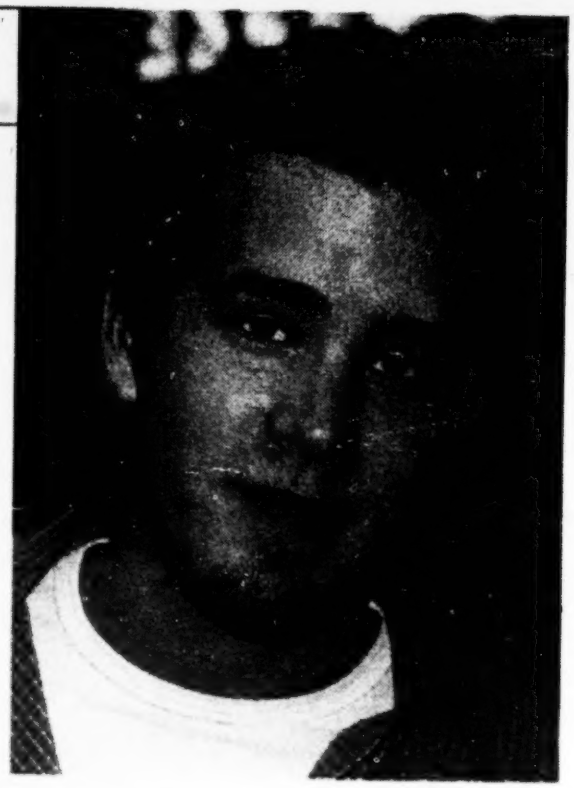
8:30PM
FOX
Getting Personal

2 4 **In Character:** As the mingling, single Milo, this tall, dark and handsome gentleman definitely makes the office setting on Fox's hit comedy *Getting Personal* a place for business *and* pleasure.

5 7 **Past Lives:** Before making it big on the small screen, delicious Duane had already secured a prominent slot in filmdom with juicy dramatic roles in flicks such as *Scream 2* and *Above The Rim*, and proved his comedic prowess opposite Jada Pinkett in *Woo*.

9 11 13 **Secret Talent:** It seems his role in the fierce basketball drama *Above The Rim* wasn't too far-fetched. This multi-faceted Brooklyn native displayed an affinity for shooting hoops before he started shooting scenes. Thanks to his moves on the court, the dark-eyed talent was drafted by the New York Knicks.

Ryan Reynolds



8:30PM ABC **Two Guys, A Girl And A Pizza Place**

2 **In Character:** As Michael "Berg" Bergen on *Two Guys, A Girl And A Pizza Place*, Ryan gives new meaning to service with a smile.

4 **Past Lives:** Ryan's assets were showcased on the 1991 Nickelodeon series *Fifteen*. He's also made hearts race in several made-for-television movies, including *Serving in Silence: The Margarethe Cammermeyer Story* and *In Cold Blood*.

5

7 **Coming Up:** If you still can't get enough of this Canadian delight, Ryan charms the big screen three times in 1999. Look for *Coming Soon*, where he struts his stuff while donning a nipple ring as a rock star, *Dick*, a comedy about Nixon and *Monster*.

9

11 **Homebase:** Ryan adds sexiness to the scenery whenever he walks his dog, Jobey, around his Los Angeles neighborhood.

13 **What He Likes Best About TV:** Ryan wants roles that feed his mind as well as his incredible body. "(I love) creating something. You can take some chances and risks and build a show."

Jeremy London

9:00PM FOX **Party Of Five**

2 **In Character:** Griffin, the perpetually distressed husband of Neve Campbell's character, Julia, on Fox's moving drama, *Party of Five*.

4

5 **Past Lives:** If you think you've seen his double—you have! His equally appetizing twin brother, Jason, has appeared in the films *Man in the Moon* and *To Wong Foo*. Jeremy's had film success of his own in Generation X comedies like *Mallrats*.

7

9 ***Sign* Of The Times:** It's no wonder the sensitive and sensual Scorpio, who calls himself the "more emotional" twin, was wounded after his ruthless fiancée dumped him out of the blue *and* kept the ring.

11 **Turn Offs:** "I avoid crazy women and women who demand attention all the time."

13

Joe Rogan

9:30PM NBC **NewsRadio**

2 **In Character:** Handyman Joe Garelli, the resident electrician on *NewsRadio*, can fix anything with his tantalizing tool and sexy smile.

4

5 **Past Lives:** He proved he was "solid material" on the TV series *Hardball* before winning our hearts with his funny *boner* at *Caroline's Comedy Hour*, *Comedy From The Danger Zone* and *Stand-up Spotlight*.

7

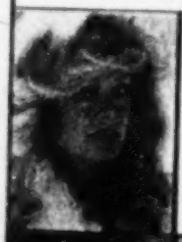
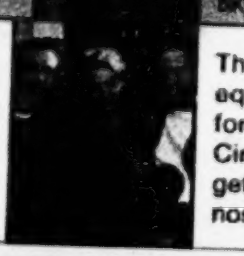
9 **Spare Time:** This hunky animal lover (he has two dogs and three cats) can protect you from anyone. He's studied martial arts since he was six including Tae Kwon Do, jujitsu and kick-boxing.

11 **Homebase:** Born and raised in Beantown, Joe lives in Los Angeles where you can often find him chalking up his stick to break balls while playing pool.

TUBE TWOSOMES

TV GUYS

PLAYGIRL plays matchmaker with primetime personalities

The Couple	The Plot	Syndication Potential
 **Jill Munroe and Angel**	Since Angel plays a 242-year-old ghoul, Farrah was the oldest living relic fit to play his love interest in this bizarre, gothic love story.	Soon after the show's pilot, things quickly unravel when kooky Farrah, armed with an iron poker, flips on her co-star and tries to plunge the thing into his vampire chest.
Daisy Duke and Perry	Sick of the public relations grind, Perry goes back to underwear modeling, where he meets up with scantily-clad, fellow model Daisy Duke.	Though TV executives got giddy over saving millions in wardrobe fees, things go terribly wrong when the bare twosome sue the network after acquiring pneumonia on the drafty set.
Ally McBeal and Kyle	Dating ditzy sluts like Alyssa Milano proves unchallenging for the bistro owner. When neurotic Ally steps in for a drink, he gets drunk on a woman with a mind of her own.	Several episodes later, the show is canned when viewers can't believe Ally has the energy to go out drinking after a 12-hour day in court *and* nail a stud like Nick despite being a psychological nutcase.
Blaire Werner and Ben	Wholesome hijinks ensue when all-American Ben shares a dorm room with goody-two-shoes Blaire in this moral match-up made in TV heaven.	After a season of low ratings, things are spiced up—but just as Ben gets ready to deflower Blaire, a 98-year-old Mrs. Garrett barges in and goes ballistic.
Kelly Bundy and Joey	Sick and tired of being labeled a dumb-ass, Matt decides to shack up with an even bigger blockhead, Kelly Bundy, to finally make himself look like a smarty-pants in millions of television junkies' eyes.	After one mindless season, viewers pan the sophomoric pairing but MTV soon picks it up for repeats to compliment *Beavis and Butthead*, their resident idiots, for weekend moronathons.
Amanda Woodward and Griffin	After his long-suffering wife, Julia, tires of his woe-is-me act on *Party of Five* and rightfully kicks his ass out, Griffin nabs a job as Amanda's advertising assistant/slave.	Sexually frustrated coach potatoes addictively tune in weekly to see Griffin suck Amanda's toes and give her all-over body massages. The ratings skyrocket and the duo snare the coveted slot after *Frasier*.
Florence Johnston and Milo	Milo, looking for a way out of doing his laundry, finds heaven when he lays eyes on Florence, who's been out of work since the Jeffersons moved on out of that deluxe apartment in the sky-ay-ay.	After much protesting from feminist, P.C. viewers, executives are forced to shove the comedy into late-night TV hell. The insanity's stopped when it's sandwiched between infommercials for Susan Powter and repeats of *Barney Miller*.
 **The cast of *Three's Company* meet the crew of *Two Guys, A Girl And A Pizza Place***	Three guys plus three girls equals perfect orgy potential for every hot episode. Finally Cindy, Jack and Janet can all get it on right under Mr. Roper's nose.	Too racy for primetime, the series finds a home on a sexed-up, pay-per-view version of Nick at Nite. The late-night spot starts with a half-hour of the old sitcom, then moves into the partner-swapping 90s version.

BEST AVAILABLE COPY

APPENDIX F

[Relevant Portions of the Print Order for the January 1999 issue of *Playgirl*]
[*Ninth Circuit APPELLANT'S ER 168-73*]

PLAYGIRL 01/99 REVISED

PLAYGIRL	REVISED 11-10-98	
. . .		
DOMESTIC		
REGULAR	59,245	A
PAPER BAND	400	A
NCS BLUE BAGGED	80,300	A
SHRINK WRAPPED	63,305	A
Total Warner Copies (Version A)	203,250	
CANADA		
REGULAR	13,750	C
NCS BLUE BAGGED	1,850	C
SHRINK WRAPPED	7,400	C
Total Warner Copies (Version C)	23,000	
FOREIGN MILITARY		
REGULAR	7,975	A
NCS BLUE BAGGED	100	A
SHRINK WRAPPED	17,600	A
Total WMS Copies (Version A)	25,675	

Deyco Copies – Regular	13,750	A
Deyco Copies – Opaque	1,850	A
Deyco Copies – Shrinkwrap	7,400	A
Grand Total Deyco Copies:	23,000	

APPENDIX G

[Excerpts of Deposition Testimony]
[*Ninth Circuit APPELLANT'S ER 266-67, 300-02, 304-05, 687-88, 597, 606, 1081-82*]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOSE SOLANO, JR., Plaintiff, v. PLAYGIRL, INC.; and DOES 1 through 25, Inclusive, Defendants.	No. 00-01242 DT (Ex)

Deposition of **JOSE SOLANO, JR.**, taken on behalf of the Defendants, at 333 South Hope Street, 48th Floor, Los Angeles, California, commencing at 9:10 A.M., Friday, December 22, 2000, before Nora Daneshrad, Certified Shorthand Reporter No. 11754.

. . .

[ER 266-67]

Q After you first heard about the Playgirl issue, did you go see any sort of therapist or doctor, psychologist, physician because of stress or anything else arising out of that?

A I went and saw my father. And he – because I was very uncomfortable because wherever I went people were, like paparazzi and whatnot, they would – they would present the magazine to me to autograph and stuff like that. And I would be with friends and business associates,

and so it was kind of embarrassing. And I didn't know how to deal with the circumstances. So I, you know, I went to my father, who, you know, he does a lot of spiritual counseling, and he's my counselor. So we had long talks about the situation.

Q Did you see any sort of – putting aside your father, any sort of medical professional?

A No.

. . .

[ER 300-02]

A . . . a lot of these people don't – it is my assumption that they don't want to associate with somebody who is, you know, that is associated with – with taking their clothes off in a magazine.

Q But did he ever tell you that?

A No. Not directly, no.

Q Did he ever tell you indirectly through somebody else?

A No.

Q How about Andy Lauer? Did he ever tell you that?

A No.

Q Did Melissa Joan Hart ever tell you that?

A No.

Q Patricia Bosse? Did she ever tell you that?

A No.

Q Luis Zavala? Did he ever tell you that?

A Yes, he would say that – Luis is a filmmaker. He said this is – "This definitely could hurt your career."

Q Did he tell you that he didn't want to associate with you anymore because you had been depicted on the magazine?

A No, not directly.

Q Did he tell you indirectly through somebody else?

A No.

Q How about, is it Thyme Lewis?

A Thyme.

Q Thyme? Did she ever tell you that she didn't want to associate with you because you were depicted on the magazine?

A No.

Q And the same question about Alina Peralta.

A No.

Q Same question for Brooke Lee.

A No.

Q And same question for Halle Berry.

A No.

Q Has anybody ever told you that they don't want to associate with you because you appeared on Playgirl magazine?

A No.

Q Has anybody ever told you that they don't want to work with you because you were pictured on Playgirl magazine?

A No.

. . .

[ER 304-05]

Q My specific question is you state at the end of that paragraph that you've suffered damage in excess of a million dollars because of Playgirl. And my question is how do you come up with that figure?

A Personally, the embarrassment that my family has suffered through this, when I go home, the thought, because – that I would be nude in this magazine. Many relationships that I've lost of people that I would communicate on a day-to-day basis, people that I just can't get ahold of any more.

Q Anything else?

A I don't think – actually, you can't put a price on humiliation and embarrassment.

Q You talked about many relationships – you said, "Many relationships that I've lost, people I used to communicate with on a day-to-day basis." What relationships have you lost because of your appearance in Playgirl?

A Well, I used to get invited to a lot of charity events that where I would work with kids, mentoring-type organizations. And I'm no longer invited to a lot of these events because of the association with Playgirl.

Q Has anybody ever told you that's the reason you're not being invited to a charity event, because of the association with Playgirl?

A Not directly or indirectly.

Q Is that just an assumption on your part?

A It's an assumption on my part.

Q Any other relationships that you've lost because of Playgirl?

A I'm drawing a blank.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOSE SOLANO, JR., Plaintiff, v. PLAYGIRL, INC.; and DOES 1 through 25, Inclusive, Defendants.	No. 00-01242 DT (Ex)

Videotape deposition of **SERENA L. SPIEZIO**, a witness, taken by plaintiff, pursuant to subpoena, held at the offices of Hale and Dorr, LLP 405 Lexington Avenue, New York, New York 10174 on November 1, 2000 at 4:45 p.m., before Robert M. Levine, CM, a Shorthand Reporter and Notary Public of the State of New York.

. . .

[ER 687-88]

Q Let me direct your attention to what's been described to me previously as the banner. Is the phrase "Primetime's Sexy Young Stars Exposed" what's described as a banner –

A Yes.

Q – on this cover? Okay, taking a look at that banner, do you think it would be reasonable for somebody seeing this cover as a whole, including the picture of Jose Solano, to expect to see nude photos of Jose Solano inside the magazine?

MR. RAYGOR: Same objection. It asks her to guess what might be in somebody's head when they read that.

A Yes.

Q Why?

A Because it says TV Guys and they're being exposed. And it's Playgirl magazine. What else would they be exposing but their bodies?

. . .

Q Do you know who wrote the banner?

A No, I don't.

Q Do you know who decided where to place the phrase "12 Sizzling Centerfolds Ready To Score With You"?

A No, I do not.

Q And I know you told us a moment ago that you wrote the phrase or placed the phrase "Bottoms Up! Hot Celebrity Buns"

A No, I didn't write it. I laid out the feature on the inside.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOSE SOLANO, JR., Plaintiff, v. PLAYGIRL, INC.; and DOES 1 through 25, Inclusive, Defendants.	No. 00-01242 DT (Ex)

Videotape deposition of **THERESA O'ROURKE**, a witness, taken by plaintiff, pursuant to subpoena, held at the offices of Hale and Dorr, LLP, 405 Lexington Avenue, New York, New York 10174 on November 2, 2000 at 2:00 p.m., before Robert M. Levine, CM, a Shorthand Reporter and Notary Public of the State of New York.

. . .

[ER 597]

Q In particular, the thing that you pointed out was the frames "Primetime's Sexy Young Stars Exposed"

A Yes.

Q Do you remember who wrote that line?

A It was – it could have been either, any one of us. I can't remember. . . .

. . .

[ER 606, 1081-82]

A . . . you know, he [*Carmine Bellucci*] didn't, really didn't think there was anything wrong with having 12 there next to the body because he didn't think it was suggesting anything. . . .

A . . . So we, I think, coming into it we were kind of – we would overanalyze things so. . . .

Q As you recall –

MR. RAYGOR: Please try not to interrupt her answers.

Q I'm sorry, Ms. O'Rourke. Were you done?

A Yes, pretty much. I just said that we would overanalyze things. . . .

APPENDIX H

[Excerpts from a Transcript of Solano's January 1999 Interview on the Television Show *Donny & Marie* Hosted by Donny Osmond and Marie Osmond]
[*Ninth Circuit* APPELLEE'S *SER 1346-48 (emphasis in original)*]

Donny: All right.

Marie: All right, he is the first Latin cast member on ***the hit series Baywatch***. And it is not just his physique that is impressing his fans. Take a look at this.

[Clip shown of José Solano, Jr. in character as 'Manny Gutierrez' from the television series *Baywatch*]

. . .

Marie: Please welcome, José Solano.

[Inaudible.]

Marie: Well, we like you too. This is a likeable show.

Donny: Great looking suit.

Solano: Thanks. This is, there's a story behind this suit.

Marie: [To the audience.] Oh just take a breath!

Solano: There's a story behind this suit, actually.

Donny: Well, tell us, tell us.

Solano: Well, about three years ago, before I landed the role on *Baywatch*, I used to work for a clothing company. And, um, there I was working at Structure in the

mall in San Jose, California. And a friend of mine who we spent some time in college, she said 'Listen, there's this contest, in this magazine entitled 'The *Young and Modern* Man of the Year' contest. And I ended up, uh, you know, taking some pictures at the beach. She submitted them to the magazine. Next thing I know, I won the contest. Paid, you know, they, ga-, I, I won like $6,500, I paid off my, my tuition. And I was in debt, right?

Donny: Right.

Solano: And, um, you know, headed towards UCLA. But before that, the, the producers of the show saw the pictures in the magazine, called me in for a series of auditions, and a swim test later, um, I got the role, with no acting experience.

Donny: From the magazine?

Marie: From the magazine?

Donny: You're kidding!

Solano: From the magazine, so I owe it all to *YM*.

Marie: Did you have any idea –

Donny: That's a great story!

Marie: Did you have any idea that that's, the magazine thing could lead to something like that, especially acting?

Solano: No idea. I mean the possibility's always out there. That's why I really encourage people, to um, you know, to go for their dreams. And, and, and any little thing. I mean, you could walk into a store and you could

meet Steven Spielberg or George Lucas, and, and you could have the right look and 'bam', just like that it will happen.

Donny: Yeah, yeah.

Solano: So, I mean . . . it's life.

Donny: It happens.

Marie: Now, speaking, speaking of magazine covers, you said you were discovered on a magazine cover. Wasn't there recently a magazine cover that you were not so happy about?

Solano: Yes, and that's, um, kind of the, the little things in, in, in Hollywood that, that can really put a burden on you, um. You know, I come for [sic] a very rich, um, you know, upbringing, uh, religiously. And so, I wake up one morning, my publicist tells me 'Get . . . you're not going to believe what cover you're on.' And then they told me I was on *Playgirl* magazine. And I'm like . .

Donny: Whoa!

Solano: I can't believe this, you know.

Marie: Did you pose for *Playgirl*?

Solano: No, not at all. What they did was that they, they could buy pictures at a bank, um. It's like, it's a photo bank.

Donny: Did you, did you pose nude?

Solano: No, no. They just took a picture, that, that, of a photo shoot, from a free-lance photographer and, um, they just put me on the cover to sell the, the magazine.

Donny: Oh, you're kidding.

Solano: Yeah.

Donny: But with your approval.

Solano: No. Without my approval.

Marie: Is that legal?

Solano: I don't know. So that, that's the thing we're trying to find out.

Donny: So you're in the middle of it right now?

Solano: Yeah. And, and the thing is, you know, it's like when, when somebody has a clean image, you know, a role model image, and you know, parents, you know, that they nurtured us, religiously, and good upbringing. Now all of a sudden they're going to try to, you know create some kind of controversy to where, you know. . . .

Marie: What did your parents say when they saw this?

Solano: They were really upset. I mean, I mean, can you imagine?

Marie: [Laughter] Can you imagine? ***I'm sorry to laugh, I find all these things humorous.*** I'm kind of, you know, sick, but . . . [Laughter] No, but, it's amazing how things like that can happen . . . innocently . . .

Donny: Do you have siblings? And what do they think of it too?

Solano: Um, **well my, my brothers are like, 'Way to go guy.' [Holding thumbs up]**

[Laughing, clapping, and cheering.]

Marie: So do you have brothers, just brothers?

. . . .

Supreme Court U.S.
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No. 02-411

IN THE

Supreme Court of the United States

PLAYGIRL, INC.,

Petitioner,

v.

JOSE SOLANO, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER QUESTIONS PRESENTED

Pursuant to Supreme Court Rule 15.2, Respondent Jose Solano, Jr. objects to the questions presented by Petitioner Playgirl, Inc. ("Playgirl") because they are unduly argumentative in violation of Supreme Court Rule 14.1(a) and seek consideration of questions not accurately reflecting the proceedings or holding below. If this Court is inclined to grant certiorari in this action, Respondent respectfully submits that the following are more accurately-phrased questions:

1. Did the Ninth Circuit correctly apply widely-accepted standards in reversing summary judgment on the issue of the falsity of the message conveyed by the January 1999 cover of Playgirl Magazine?

2. Did the Ninth Circuit correctly apply the appropriate standard on the issue of actual malice by reversing summary judgment because a reasonable jury could find actual malice under a clear and convincing evidence standard?

3. Was the Ninth Circuit correct in holding that intentionally false speech is not protected under the First Amendment?

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Ashcroft v. American Civil Liberties Union, 122 S. Ct. 1700 (2002) 17

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Braun v. Flynt, 726 F.2d 245 (5th Cir. 1984), *cert. denied*, 469 U.S. 883 (1984) 8, 9

Brown v. Petrolite Corp., 965 F.2d 38 (5th Cir. 1992) 11, 14

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Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974) 17

Curtis Publishing v. Butts, 388 U.S. 130 (1967) ... 13

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Eastwood v. Superior Court, 198 Cal. Rptr. 342 (Ct. App. 1983) 18

Gertz v. Robert Welch, 418 U.S. 323 (1974) 12

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Cited Authorities

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Towne v. Eisner, 245 U.S. 418 (1918)	8
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Weyrich v. New Republic, Inc., 235 F.3d 617 (D.C. Cir. 2001)	8
United States Constitution:	
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Cited Authorities

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Rules:

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Sup. Ct. R. 14.1(a) ..... i, 2

Sup. Ct. R. 15.2 i

Other Authority:

R. Smolla, *Law of Defamation*, (11th ed. 1997), § 4.05[1] 9

STATEMENT OF THE CASE

I. Introduction and Summary of Argument

The pending petition for certiorari challenges a reversal of summary judgment arising from a false message knowingly conveyed by Petitioner Playgirl, Inc. ("Playgirl"). On the January 1999 cover of Playgirl Magazine – a publication renowned for its photographs of naked men and other sexually-explicit content – Playgirl falsely represented that Respondent Jose Solano, Jr., a television actor, had posed nude for the magazine, and that his nude body could be viewed within its pages. Playgirl conveyed that false message to the public by surrounding a photograph of Mr. Solano's upper body with the following headlines:

"PRIMETIME'S SEXY YOUNG STARS EXPOSED"

"12 SIZZLING CENTERFOLDS Ready to Score with You"

"BOTTOMS UP! Hot Celebrity Buns"

"BAYWATCH'S BEST BODY Jose Solano"

Members of Playgirl's editorial staff, including its third most senior editor, testified in deposition that the staff composed the January 1999 cover knowing that, based on these suggestive headlines overlapping Mr. Solano's photograph, "someone's going to think that he's naked in there." App. 14a. In reality, Mr. Solano had never authorized Playgirl to use his name or photograph, much less posed nude for the magazine. Following its senior vice president's edict to "sex up" the magazine's covers, Playgirl proceeded to publish these misleading headlines juxtaposed with Mr. Solano's photograph, even though members of its own

editorial team "didn't feel like it was fair to do that." App. 5a-6a, 12a. Based on this record, a three-justice panel of the United States Court of Appeals for the Ninth Circuit unanimously reversed the District Court's erroneous entry of summary judgment in Playgirl's favor, and remanded the case for trial.

Playgirl's petition fails to provide any basis for this Court to review the Ninth Circuit's decision. Despite the length and number of the questions presented in its petition, Playgirl does not, and cannot, identify: (1) a conflict with the holdings of other federal appellate courts or with state courts of last resort sufficient to warrant this Court's intervention; (2) a conflict with this Court's relevant decisions; or (3) an important unsettled question of federal law, as required to warrant this Court's review. *See* Sup. Ct. R. 10.[1] Nor can Playgirl demonstrate that certiorari is necessary to remedy an injustice or undo a grave harm. No liability has been imposed in this case; all that is at issue on the pending petition is the Ninth Circuit's conclusion that triable issues of fact exist, entitling Mr. Solano to a trial.

---

1. In addition to its substantive defects, Playgirl's petition also is procedurally defective, and should be denied on that basis. Specifically, Playgirl's petition violates Supreme Court Rule 14.1(a), which provides in pertinent part: "The questions [presented for review] should be short and should not be argumentative or repetitive." Sup. Ct. R. 14.1(a). Here, Playgirl's proposed questions – which consume nearly two full pages – are both prolix and argumentative in the extreme. The questions also are impermissibly prefaced by a paragraph of narrative text mischaracterizing the facts of this case, in violation of Rule 14.1(a)'s provision that "no other information may appear" on the page of a petition containing the questions presented for review. *Id.*

First, Playgirl cannot demonstrate that grounds for certiorari are presented by the Ninth Circuit's holding that triable issues of fact exist regarding the falsity of the message Playgirl conveyed by juxtaposing Mr. Solano's photograph with headlines promising "exposed" television stars and "sizzling centerfolds" on the cover of a magazine best known for explicit pictures of naked men. In deciding that a jury question exists because Playgirl's January 1999 cover is reasonably susceptible to a false meaning, the Ninth Circuit applied a well-established standard similar to those employed in other circuits and state courts. This widely-applied standard simply reflects the basic reality that many misleading statements, though arguably susceptible to an innocent construction if parsed word-by-word in isolation, convey a decidedly false and disparaging message when viewed and read in context. This is particularly true of the statements at issue in this case, in light of Playgirl Magazine's sexually-explicit content, and the fact that it is displayed for sale in sealed plastic bags, preventing curious shoppers from ascertaining its true contents.

Second, Playgirl cannot show grounds for certiorari based on the Ninth Circuit's holding that triable issues of fact exist on the issue of actual malice, *i.e.*, Playgirl's knowledge that its January 1999 cover conveyed a false message regarding Mr. Solano, or its reckless disregard regarding the cover's truth or falsity. On this issue, the Ninth Circuit applied the standards this Court has established for the actual malice analysis, and found that, based on the record before it, a reasonable jury *could* find actual malice under a clear and convincing evidentiary standard. To require a showing beyond this effectively would rewrite the summary judgment standard, and would eliminate the role of the jury on all claims which require proof of actual malice.

Finally, Playgirl cannot demonstrate that this Court's review of the Ninth Circuit's decision is necessary to avert a chill on expression protected under the First Amendment, in connection with California's false light or misappropriation torts, or on any other theory. The Ninth Circuit's decision, and Mr. Solano's claims, are entirely consistent with this Court's pronouncements, and similar pronouncements by the federal appellate courts and state courts of last resort, that the First Amendment affords no protection to intentionally false speech.

II. Underlying Facts

Mr. Solano is thirty-one years old, and was raised in Northern California. Following his high school graduation in 1989, Mr. Solano joined the United States Navy, and served on an amphibious assault ship during the Persian Gulf war. After receiving an honorable discharge, Mr. Solano attended college and began an acting career, which included his portrayal of a lifeguard on the television show *Baywatch*. Mr. Solano has never accepted an acting role involving nudity, has never posed for nude photographs, and has never consented to the use of his name or photograph in Playgirl Magazine.

Since at least 1990, every issue of Playgirl Magazine has contained photos of naked men, including a nude "centerfold" consisting of a photograph of a naked man displayed over two pages. App. 4a. At most newsstands, Playgirl Magazine is displayed in sealed plastic bags, that reveal the magazine's cover but prevent a potential purchaser or casual browser from opening the magazine to determine if the man pictured on the cover actually appears nude inside. Pet. at p. 7 n.2; Pet. App. 1f-2f.

In late 1998, Playgirl's senior vice president Carmine Bellucci instructed the members of Playgirl's editorial staff that they "really needed to sex up the magazine . . . he wanted it to be basically like dripping sex." App. 5a-6a. Theresa O'Rourke, Playgirl's associate editor at the time, gave this account of Bellucci's directive: "[U]sing hotter words, hotter adjectives . . . just trying to give the impression that there was more in the magazine. There was more nudity in the magazine." App. 8a.[2]

Bellucci reiterated that directive during the editorial meeting in or about October 1998, at which Playgirl's staff composed the headlines to accompany Mr. Solano's photograph on the January 1999 cover. App. 8a. In keeping with Bellucci's instructions, Playgirl's editorial team composed the text that appeared on the top of the cover, "PRIMETIME'S SEXY YOUNG STARS EXPOSED." As Ms. O'Rourke testified in deposition, the intent behind this headline was to convey the false impression that Mr. Solano – the only television actor whose picture was slated to appear on the cover – appeared nude inside the magazine:

> Q. Would it be fair to say then that the objective of writing a line like "Primetime's Sexy Young Stars Exposed" was to convey the impression that

---

2. Contrary to Playgirl's attempts to trivialize her role in the editorial process, the record establishes that Ms. O'Rourke – whose name appeared third from the top of the editorial masthead in the January 1999 issue of Playgirl Magazine – was directly involved in the composition of the cover headlines at issue in this lawsuit, and participated in the meetings at which those cover headlines were discussed. App. 4a-8a.

there were nude photos of primetime's stars in the magazine without expressly saying that?

A. Yes.

App. 9a.[3]

At the time this and the other cover headlines were composed, Playgirl knew that no nude photos of Mr. Solano or any other primetime television actors would appear in the January 1999 issue. App. 2a-3a. As Ms. O'Rourke testified in deposition, she and other members of Playgirl's editorial staff had serious misgivings about conveying a false message to the contrary: "[S]ome of us didn't feel like it was fair to do that." App. 12a.

Playgirl also was aware that the headline "12 SIZZLING CENTERFOLDS Ready To Score With You" was likely to mislead readers into believing that Mr. Solano was one of the nude centerfold models. Playgirl intentionally placed this language on the upper left corner of the cover, where text pertaining to the man on the cover ordinarily would appear. App. 13a-14a ("Q. You're pointing to the space where the '12 Sizzling Centerfolds' language is? A. Yes. Q. And that ordinarily is where language pertaining to the cover subject would appear on a cover [of Playgirl]? A. Yes.").

---

3. Playgirl does not dispute that, at the time this headline was composed, the phrase "Primetime's Sexy Young Stars" was intended to refer to Mr. Solano. App. 2a-3a ("Q. At the time you approved the banner for the January 1999 Playgirl cover, did you understand Jose Solano to be a primetime sexy young star as those words are used in the banner? A. Yes.").

At their cover line meeting, Playgirl's editors discussed the false impression they knew was likely to arise from this deceptive headline placement: "I know something was voiced because we'd always say this is where the cover subject goes. So, you know, someone's going to think that he's naked in there." App. 14a-15a. Ms. O'Rourke testified that these and similar concerns were regularly "blown off" by senior vice president Carmine Bellucci: "It was just, so what." App. 14a-15a.[4]

The January 1999 issue of Playgirl Magazine was displayed on newsstands in mid-December 1998. The issue contained images of simulated oral sex, simulated sexual intercourse, photographs of naked men in various states of sexual arousal, close up photographs of men's penises and dozens of advertisements for phone sex services and sexually-explicit paraphernalia. The feature entitled "TV Guys" began on page 20 of the magazine. No nude photographs of Mr. Solano or any other television actors appeared in that feature or anywhere else in the magazine.

As a result of the false impression Playgirl's January 1999 cover conveyed, Mr. Solano suffered profound humiliation and embarrassment, and repeatedly was required to assure his friends and business associates that, contrary to the message of Playgirl's cover headlines, he had not posed nude for the magazine.

---

4. The January 1999 cover also contained the headline "BOTTOMS UP! Hot Celebrity Buns," positioned near the bottom portion of Mr. Solano's body. Playgirl admits that Mr. Solano was the only "celebrity" pictured on the cover, and that the term "buns" refers to a man's buttocks. App. 3a. Finally, overlapping Mr. Solano's thigh, the cover contained the headline "BAYWATCH'S BEST BODY Jose Solano."

REASONS FOR DENYING THE PETITION

I. In Holding That Triable Issues Of Fact Exist Regarding The Falsity Of The Message Conveyed By The January 1999 Cover Of Playgirl Magazine, The Ninth Circuit Correctly Applied A Well-Established And Widely-Accepted Legal Standard

Playgirl bases the first portion of its petition on the assertion that, in deciding that triable issues of fact exist based on evidence that the January 1999 cover of Playgirl Magazine was reasonably susceptible to a false meaning, the Ninth Circuit applied an inappropriate standard. Playgirl is wrong.

The law has long recognized that words and phrases take on meaning from their accompanying context. As Justice Holmes observed in *Towne v. Eisner*, 245 U.S. 418, 425 (1918), "[a] word is not crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used."

In the context of claims for defamation or false light, the courts repeatedly have underscored the importance of the role of the trier of fact in examining words and phrases in their full context, to determine if the meaning they conveyed was actionable or innocent.[5] As the Third Circuit explained

5. While defamation and false light are separate causes of action, numerous courts have recognized that the two claims are substantively similar, contrary to Playgirl's attempts to compartmentalize the two torts. *See Howard v. Antilla*, 294 F.3d 244, 250-51 (1st Cir. 2002); *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 627 (D.C. Cir. 2001); *Braun v. Flynt*, 726 F.2d 245, 250 (5th Cir. 1984) ("Federal courts

(Cont'd)

in reversing summary judgment on a defamation claim, "[w]ords take on meaning in the company of other words. They are gregarious. They take on tone and color from syntax and context." *St. Surin v. Virgin Islands Daily News*, 21 F.3d 1309, 1317 (3d Cir. 1994). The effect of context may be enough to transform an otherwise benign phrase into a defamatory charge; "words innocent on their face may, when explained in context, convey a defamatory meaning." R. Smolla, *Law of Defamation*, (11th ed. 1997), § 4.05[1].[6]

To preserve the interpretive role of the trier of fact in evaluating statements in context, a number of federal appellate courts, applying state law in diversity actions, repeatedly have articulated the same standard applied by the Ninth Circuit in this case – holding that triable issues of fact exist where a statement reasonably could be understood in a defamatory sense, even if an innocent meaning also is possible. Thus, in *McBride v. Merrell Dow and Pharmaceuticals, Inc.*, 717 F.2d 1460 (D.C. Cir. 1983), the District of Columbia Circuit declined to apply an "innocent

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(Cont'd)

have frequently noted the similarities between the two causes of action and have often carried over elements of state defamation law into their consideration of false light invasion claims."), *cert. denied*, 469 U.S. 883 (1984). California law, applicable to this diversity case, is no different. *Selleck v. Globe Int'l*, 212 Cal. Rptr. 838, 845 (Ct. App. 1985) ("An action for invasion of privacy is in substance equivalent to a libel claim.").

6. In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990), this Court recognized the converse of this principle, holding that statements couched in the context of opinion may give rise to liability where "a reasonable factfinder could conclude that the statements . . . imply [a factual] assertion[.]"

construction" standard, and reversed a trial court's entry of dismissal:

> [A] court's power to hold as a matter of law that a statement is not defamatory is very limited. It is only when the court can say that the publication is not reasonably capable of any defamatory meaning and cannot reasonably be understood in any defamatory sense that it can rule as a matter of law that it is not libelous.

Id. at 1465 (citations omitted).

Similarly, in *Toney v. WCCO Television*, 85 F.3d 383 (8th Cir. 1996), the Eighth Circuit partially reversed a summary judgment based on statements "that are reasonably susceptible to a defamatory meaning as well as an innocent one." *Id.* at 386. In reasoning strikingly similar to the Ninth Circuit's in this case, the court held: "If the words are capable of a defamatory meaning, it is for the jury to decide if they in fact were so understood. Thus, at the summary judgment stage, the judge must not conclusively interpret [such a] statement; rather, the judge should only decide whether a statement is capable of being interpreted as defamatory." *Id.* (citations omitted).

McBride and *Toney* are just two examples of this well-established standard for the evaluation of statements that form the basis of defamation or false light claims. As the Second Circuit recognized in *Levin v. McPhee*, 119 F.3d 189 (2d Cir. 1997), the threshold inquiry under New York law is the same as the California standard applied by the Ninth Circuit in this case – namely, "whether the statement allegedly to have caused plaintiff an injury is *reasonably susceptible* to the

defamatory meaning imputed to it." *Id.* at 195 (emphasis added). *See also Wells v. Liddy*, 186 F.3d 505, 530-31 (4th Cir. 1999) (partially reversing summary judgment; under Virginia law, statements "capable of defamatory meaning" must be evaluated by trier of fact); *Brown v. Petrolite Corp.*, 965 F.2d 38, 43 (5th Cir. 1992) (affirming judgment for plaintiff on defamation claim; "Texas law looks to the effect of the statement on 'ordinary readers'"); *Afro-American Publishing Co. v. Eli Jaffe*, 366 F.2d 649, 655 (D.C. Cir. 1966) ("What counts is not the painstaking parsing of a scholar in his study, but how the newspaper article is viewed through the eyes of a reader of average interest.").[7]

The contrary rule Playgirl advocates in this case – which would eliminate the availability of general damages if a defendant's false message conceivably is susceptible to an innocent construction – runs afoul of this Court's settled pronouncements on both liability and damages in expression-related cases. First, Playgirl's proposed test ignores the *Milkovich* court's emphasis on the role of a "reasonable factfinder" in assessing the existence of a false factual message, by empowering courts to limit a plaintiff's recovery

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7. *Pope v. Chronicle Publishing Company*, 95 F.3d 607 (7th Cir. 1996), cited by Playgirl, does not conflict with these authorities or with the Ninth Circuit's decision in this case. Although the *Pope* court applied an "innocent construction" standard under Illinois law, that standard requires that statements be "considered *in context*, with the words *and the implications therefrom* given their natural and obvious meaning." *Id.* at 613 (emphasis added, citations omitted). In this case, given the context in which Playgirl's headlines appeared (namely, the cover of a magazine renowned for its photographs of naked men), the record compels the conclusion that the "natural and obvious meaning" of terms like "exposed" and "sizzling centerfolds" overlapping Mr. Solano's photograph is the unmistakable message that he appeared nude in the magazine.

to special damages based on a judge's singlehanded determination on summary judgment that an innocent construction of the statements at issue may exist. *See Milkovich*, 497 U.S. at 21. Playgirl's drastic elimination of the availability of general damages whenever an innocent construction is possible also would ignore this Court's recognition that "actual injury [from false statements] is not limited to out-of-pocket loss," and that general damages are available to redress "personal humiliation, and mental anguish and suffering." *Gertz v. Robert Welch*, 418 U.S. 323, 350 (1974).

Apart from the legal flaws in Playgirl's approach, the unique factual record of this case eliminates the risk of the hypothetical editorial dilemmas described in Playgirl's petition. As reflected in the Ninth Circuit's decision, its reversal of the District Court's summary judgment was based on a highly unusual confluence of factors – including the unique context of a magazine notorious for publishing photographs of naked men, the particular impact of Playgirl's headlines in light of the public display of the magazine in sealed plastic bags, and the admissions by Playgirl's witnesses that those headlines could be read to state that Mr. Solano appeared nude inside. App. 2a-3a; 15a-16a.[8]

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8. Contrary to Playgirl's suggestion in its petition that its witnesses ascribed only innocent meanings to the headlines at issue in this case, even Playgirl's senior vice president Carmine Bellucci conceded that the headline language is reasonably susceptible to the false meaning that Mr. Solano appeared nude in Playgirl Magazine: "Q. Can exposed refer to photographic exposure? A. Yes. Q. Can exposed refer to exposure in nude photographs? A. Perhaps."). App. 2a.

These are not circumstances that are likely to arise in any of the hypothetical scenarios Playgirl posits, and they do not warrant the exceptional measure of a writ of certiorari.[9]

II. The Ninth Circuit Correctly Applied Well-Established Standards On The Issue Of Actual Malice

In addition to challenging the Ninth Circuit's holding that triable issues of fact exist regarding the falsity of the headlines on the January 1999 cover of Playgirl Magazine, Playgirl also challenges the Ninth Circuit's holding that triable issues of fact exist on the issue of actual malice – Playgirl's knowledge that it was conveying a false impression, or its reckless disregard for the truth or falsity of its message. Here again, Playgirl cannot demonstrate that the Ninth Circuit deviated from settled law, or that its holding was so unjust as to warrant certiorari.

It has long been established that a plaintiff may prevail on the issue of actual malice through the use of "direct or indirect evidence." *Herbert v. Lando*, 441 U.S. 153, 160 (1979). As this Court has observed, actual malice, like other issues turning on a defendant's state of mind, "does not readily lend itself to summary disposition." *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979). A defendant's motivation – like Playgirl's intent to "sex up" its magazine covers – is highly relevant to the actual malice analysis. *Curtis Publishing v. Butts*, 388 U.S. 130, 169 (1967) (Warren, C.J., concurring) (stating that actual malice was question of

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9. Notably, *none* of the hypothetical scenarios Playgirl describes involve sexually-explicit content like that of Playgirl Magazine, or the unique impact of headlines when a magazine is displayed for sale in sealed plastic bags.

fact where defendant was "anxious to change its image" and adopted "a program of 'sophisticated muckraking' designed to 'provoke people, make them mad.'"). Recognizing defendants' natural inclinations to deny liability, this Court has held that "professions of good faith" cannot suffice to negate evidence to the contrary. *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).[10]

In light of the First Amendment interests served by the actual malice standard, this Court has held that actual malice must be established under a clear and convincing evidence standard, and that this burden of proof should be considered at the summary judgment stage. *See Anderson v. Liberty Lobby*, 477 U.S. 242 (1986). This does not, however, require a plaintiff to prove his or her case on actual malice in its entirety at the summary judgment stage. On the contrary, where a defendant moves for summary judgment on the issue of actual malice, all inferences, including "questions of credibility and of the weight to be accorded particular evidence," must be drawn in favor of the non-moving party. *Masson v. New Yorker Magazine*, 501 U.S. 496, 520 (1991).

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10. Consistent with this Court's pronouncements, the federal appellate courts have underscored the importance of circumstantial evidence in the actual malice analysis. *See, e.g., Bose Corp. v. Consumers Union*, 692 F.2d 189, 196 (1st Cir. 1982), *aff'd*, 466 U.S. 485, 512 (1984) (explaining that relevant factors in actual malice determination include "negligence, motive and intent such that an accumulation of the evidence and appropriate inferences supports the existence of actual malice"); *Brown v. Petrolite Corp.*, 965 F.2d 38, 47 (5th Cir. 1992) (stating that a "court or jury may infer actual malice from objective circumstantial evidence, which can override a defendant's protestations of good faith"); *Hunt v. Liberty Lobby*, 720 F.2d 631, 643 (11th Cir. 1983) (explaining that absent an outright admission of actual malice, a party must look to circumstantial evidence).

While a plaintiff must meet the clear and convincing standard of proof of actual malice, "during summary judgment proceedings initiated by a defendant, a court must draw all possible inferences in the plaintiff's favor." *Wells v. Liddy*, 186 F.3d 505, 543 (4th Cir. 1999); *McFarlane v. Esquire* Magazine, 74 F.3d 1296, 1304 (D.C. Cir. 1996) (stating non-moving party is entitled to an "aggregate consideration" of all the party's claims, with the evidence construed most favorably to the non-moving party).

As this Court explained in *Anderson*, a plaintiff need not demonstrate that he is certain to win at trial to withstand summary judgment on the issue of actual malice. Rather, "the plaintiff, to survive the defendant's [summary] judgment motion, need only present evidence from which a jury *might* return a verdict in his favor." *Anderson*, 477 U.S. at 257 (emphasis added).

Nowhere in this case did the Ninth Circuit depart from these clearly-established standards. Indeed, far from ignoring the clear and convincing evidence standard, the Ninth Circuit expressly acknowledged this heightened burden of proof at the outset of its actual malice analysis: "[T]o survive summary judgment [Mr. Solano] must, as a public figure, also establish by *clear and convincing evidence* that Playgirl's editors knowingly or recklessly created this false impression." Pet. App. 10a (emphasis added).

Multiple pieces of evidence support the Ninth Circuit's finding that Mr. Solano met this burden:

- Senior vice president Carmine Bellucci's directive that Playgirl's staff "sex up" the magazine's covers;

- Associate editor Theresa O'Rourke's testimony regarding intentional use of the word "exposed" to convey a false impression of nudity;

- Ms. O'Rourke's admission that she "didn't feel like it was fair to do that";

- Ms. O'Rourke's testimony regarding Playgirl's intentional placement of the "sizzling centerfolds" headline where text regarding the cover model ordinarily appeared;

- Ms. O'Rourke's recognition that, as a result of the headlines juxtaposed with Mr. Solano's photograph, "someone's going to think that he's naked in there"; and

- Ms. O'Rourke's recollection, albeit general, that these concerns were brought to Carmine Bellucci's attention.

App. 4a-15a.

Against this backdrop, Playgirl cannot demonstrate that the Ninth Circuit either applied an erroneous legal standard, or erred in the application of the correct legal standard.[11]

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11. Tacitly conceding this point, Playgirl takes issue with the Ninth Circuit's weighing of evidence, claiming that it gave Ms. O'Rourke's testimony "far more meaning" than it should have. Pet. at 24. Not only is this quibbling insufficient to warrant certiorari, but it also ignores Ms. O'Rourke's central role in the editorial process, as well as the legal principle, long established in this Court's jurisprudence, that actual malice on the part of an employee may be

(Cont'd)

No grounds for certiorari arise from the Ninth Circuit's rulings on actual malice.

III. The Ninth Circuit's Decision Does Not Chill Expression Protected Under The First Amendment

Finally, Playgirl posits that the Ninth Circuit's decision in this case signals an expansion of California's false light and misappropriation torts which would chill the exercise of First Amendment rights unless reversed by this Court. This argument ignores the impact of the findings supported by the record in this case – namely, a message reasonably susceptible to a false meaning, coupled with evidence of actual malice.

The freedom of expression protected under the First Amendment is not without limitation. *See Ashcroft v. American Civil Liberties Union*, 122 S. Ct. 1700, 1707 (2002); *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography unprotected); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement unprotected); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity unprotected); *Beauharnais v. People of State of Illinois*, 343 U.S. 250, 266 (1952) (libel unprotected). While freedom of speech is to be preserved,

> there are categories of communication and certain special utterances to which the majestic protection

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(Cont'd)
attributed to a corporate defendant like Playgirl on a theory of respondeat superior. *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 253-54 (1974) (reversing judgment for defendant; publisher was liable for writer's knowledge of falsity "under traditional doctrines of respondeat superior").

> of the First Amendment does not extend because they 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'

Bose, 466 U.S. at 504 (citations omitted).

Consistent with this reasoning, this Court directly has held that "spreading false information in and of itself carries no First Amendment credentials." *Herbert*, 441 U.S. at 171 (1979).[12] In light of the evidence that Playgirl intentionally spread false information in this case, certiorari is not necessary to protect any First Amendment interest, particularly after the Ninth Circuit's application of the elements of falsity and actual malice standard as threshold requirements for Mr. Solano to proceed to trial on *any* of his claims. No further safeguards or presumptions are necessary; as this Court stated in *Calder v. Jones*, 465 U.S. 783, 790-91 (1984), "the potential chill on protected First Amendment activity . . . is already taken into account in the constitutional limitations on the substantive law governing such suits."

Put differently, publishers are already protected from the chill Playgirl fears may arise from California's false light and misappropriation torts. As reflected in the Ninth Circuit's decision in this case, a public figure plaintiff cannot overcome

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12. California case law on statutory misappropriation of likeness, applied by the Ninth Circuit in this case, echoes this Court's statement in *Herbert*. *See Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 352 (Ct. App. 1983) ("We therefore hold that Civil Code Section 3344(d), as it pertains to news, does not provide an exemption for a knowing or reckless falsehood.").

the newsworthiness privilege applicable to these claims unless he or she produces evidence of: (1) the existence of a false message; and (2) the defendant's knowledge of falsity or reckless disregard for the truth. The Ninth Circuit's holding that the unique facts of this case satisfy both of these criteria does not mark an expansion of California's tort regime, but simply applies widely-accepted principles that already safeguard First Amendment interests.

CONCLUSION

For the foregoing reasons, Playgirl's petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — EXCERPTS OF DEPOSITION TESTIMONY

Ninth Circuit Appellant's Excerpts of Record ("ER")

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Case No. CV 00-01242 DT(Ex)

JOSE SOLANO, JR.,

Plaintiff,

–against–

PLAYGIRL, INC. and DOES 1 through 25, inclusive,

Defendant.

Videotape deposition of the defendant PLAYGIRL, INC. by CARMINE BELLUCCI, taken by plaintiff, pursuant to notice, held at the offices of Hale and Dorr, LLP 405 Lexington Avenue, New York, New York 10174 on November 1, 2000 at 2:00 p.m., before Robert M. Levine, CM, a Shorthand Reporter and Notary Public of the State of New York.

Appendix

Ninth Circuit Appellant's ER 519:6-11

* * *

Q. Can exposed also refer to photographic exposure?

A. Yes.

Q. Can exposed also refer to being exposed to a nude photograph?

A. Perhaps.

* * * *

Ninth Circuit Appellant's ER 520:12-521:6

* * *

Q. At the time you approved the banner for the January 1999 Playgirl cover, did you understand Jose Solano to be a primetime sexy young star as those words are used in the banner?

A. Yes.

Q. And you knew at the time that you approved the language in the banner that no nude photographs of Mr. Solano, in fact, appeared in Playgirl magazine that month, correct?

A. Yes.

Q. You also knew at the time you approved the text of the January 1999 Playgirl cover that, in fact, Mr. Solano was not a Playgirl centerfold that month, correct?

A. Yes.

Q. And you knew as well that Mr. Solano's buns did not appear in the January 1999 issue of Playgirl magazine, correct?

A. Yes.

* * * *

Videotape deposition of defendant PLAYGIRL, INC. by BRUCE CHEW, taken by plaintiff, pursuant to notice, held at the offices of Hale and Dorr, LLP, 405 Lexington Avenue, New York, New York 10174 on October 31, 2000 at 2:00 p.m., before Catherine M. Donahue, a Certified Shorthand Reporter and Notary Public of the State of New York.

Ninth Circuit Appellant's ER 535:2-5

* * *

Q. Do you have an understanding of what the term "buns" means as it is used in that particular phrase?

A. I would assume it is their butt.

* * * *

Appendix

Ninth Circuit Appellant's ER 535:16-19

Q. As you sit here today, can you think of any issue published since 1990 in which the Playgirl centerfold was not nude?

A. No.

* * * *

Videotape deposition of THERESA O'ROURKE, a witness, taken by plaintiff, pursuant to subpoena, held at the offices of Hale and Dorr, LLP, 405 Lexington Avenue, New York, New York 10174 on November 2, 2000 at 2:00 p.m., before Robert M. Levine, CM, a Shorthand Reporter and Notary Public of the State of New York.

Ninth Circuit Appellant's ER 583:1-24

* * *

Q. What were your duties as associate Editor of Playgirl?

A. I basically wrote all of the front of the book material which is basically what it is, front of the book, a lot of like the small blurby items that are in the front of the magazine. And I would also write the copy that went along with the pictorials from all the pictorials, interview models. There are some celebrity interviews that I had to do. And then I was, in addition to the other editors, we all helped edit the entire magazine.

Q. Were you ever responsible for writing any of the text that appeared on the covers of Playgirl magazine?

A. Yes. We used to have cover line meetings with Carmine Bellucci, with him and with all the editors at Playgirl. And we'd sit there and just hash them out like an hour or so.

Q. Was it just members of the editor staff who would participate in the cover line meetings?

A. Yes.

* * * *

Ninth Circuit Appellant's ER 590:11-591:13

* * *

Q. Did Carmine Bellucci in connection with the preparation of the January 1999 issue of Playgirl say that it was important to him that the cover generate high sales of the magazine?

A. Yes. But that was every issue he would say that. So this issue was no different.

Q. Do you recall him saying that about this issue?

A. Yes.

Q. What do you remember him saying?

A. I don't really remember word for word, but I think it was just being reiterated that our covers that were a little bit more conservative were not doing well. And that we really needed to sex up the magazine. We needed hotter cover lines. We needed hotter pictures. It just — he wanted it to be basically like dripping sex. So that's just something — we would have these conversations on a daily basis. I remember a lot like towards this period and towards the last few months of me being there.

Q. When you say "this period," are you referring to the period of time when you were working on the January 1999 —

A. Yes.

Q. — issue?

A. Yes.

* * * *

Appendix

Ninth Circuit Appellant's ER 592:19-593:14

* * *

Q. Did you participate in any meetings at which the cover lines that appear on the January 1999 cover were composed?

A. Yes. We had the typical cover line meeting with Carmine and the others.

Q. When was the cover line meeting, if you recall?

A. The cover line meeting would usually occur towards the end of the production cycle. So just as we were getting ready to go to print. Probably a week before we'd be ready to go to print. It was like one of the last things we'd do.

Q. Do you remember approximately by month when the cover line meeting took place for the January 1999 issue?

A. It was probably October, I would say.

Q. Do you remember where the meeting took place?

A. It was always in Carmine's office.

* * * *

Appendix

Ninth Circuit Appellant's ER 594:22-595:18

* * *

Q. What do you remember of the discussion at the cover line meeting for the January 1999 issue?

A. It was just again like what I was saying, about sexing up the magazine.

Q. What do you mean by "sexing up?"

A. Just, you know, using like hotter words, hotter adjectives. Just using more — just trying to give the illustration that there was more in the magazine. There was more nudity in the magazine. They were just hotter articles in the magazine. So just was just pushing that concept.

Q. At the time the January 1999 cover line meeting took place, during that meeting do you remember if anyone said anything about wanting to convey the impression that there was more nudity in the magazine than there was?

A. Yes. That was also the basis of all the cover line meetings was that we wanted to make sure that they thought they were getting more.

* * * *

Appendix

Ninth Circuit Appellant's ER 597:15-598:18

* * *

Q. Do you think that the line "Primetime's Sexy Young Stars Exposed" alludes to the possibility that there might be nude photos of television stars in the magazine?

MR. RAYGOR: Objection. You already asked that. She already told you what was behind that statement.

MR. ANSCHELL: I didn't ask the question the same way. So you can go ahead and answer.

A. Yes. Because it's exposed, naturally you think of nudity. So I'm sure that someone could take that away from it. But it was, like I said, when we wrote that we didn't say primetime's sexy young stars nude because that would be wrong. It would be a lie. So saying the word exposed gives you sort of — like it alludes to the fact that maybe there is a little bit more. You have a guy on the cover who's in his trunks so, ooh, maybe he's going to be nude. And then having I think another reason why — well, I can finish and you can go on to your next question.

Q. Would it be fair to say then that the objective of writing a line like "Primetime's Sexy Young Stars Exposed" was to convey the impression that there were nude photos of primetime's stars in the magazine without expressly saying that?

A. Yes.

* * * *

Appendix

Ninth Circuit Appellant's ER 599:9-600:6

* * *

Q. As of the time of the cover line meeting, had the pictorials for the January 1999 issue already been selected?

A. "Pictorials," meaning the nude pictorials?

Q. Yes.

A. Yes.

Q. All the nude men had already been chosen?

A. Yes.

Q. Were those of you who were in the cover line meeting made aware of that in some way before the cover line meeting?

A. Aware of the fact that the photos were chosen?

Q. Yes.

A. Yes. Because we had already — this was towards the — like I said, the end of the issue cycle when we would do cover lines. So everything was already written at that point. We had, the editors had written the copy to go with those pictorials. So, yes, everyone knew.

* * *

Appendix

Ninth Circuit Appellant's ER 600:11-15

Q. At the time that cover line was written did you know that it would be appearing somewhere near Jose Solano's picture on the January 1999 cover?

A. Yes. It was done for a reason.

* * * *

Ninth Circuit Appellant's ER 601:5-602:7

* * *

Q. Let me just make sure that our record is clear.

Ordinarily, would the cover line pertaining to the man appearing on the cover appear in the upper half of the cover just to the left of the man's picture?

A. Yes.

MR. RAYGOR: To be clear about it she was pointing at the specific place where it says "12 Sizzling Centerfolds Ready To Score With You".

THE WITNESS: Yes, for the most part. There may have been maybe an issue or two where because of the photo that we had, say, someone's face would be there so it wouldn't be there. For the most part though, that area was open. So we'd have the cover subject's cover line right here like I just said.

Q. As you recall, was there any discussion in the cover line meeting for the January 1999 issue of Playgirl magazine of conveying the impression that there was a nude centerfold of Jose Solano in the magazine without expressly saying that?

A. Yes. But it was more for this "Primetime's Sexy Young Stars Exposed" cover line.

* * * *

Ninth Circuit Appellant's ER 602:11-20

Q. Do you remember anyone in the cover line meeting for the January 1999 issue saying anything in particular about the possibility that readers might expect to see primetime's TV stars nude inside the magazine based on the phrase "Primetime's Sexy Young Stars Exposed"?

A. Yes. That would be, you know, a subject of debate every time we had a cover line meeting. Because some of us didn't feel like it was fair to do that.

* * * *

Appendix

Ninth Circuit Appellant's ER 603:13-604:17

* * *

Q. Let's return to "12 Sizzling Centerfolds Ready To Score With You".

At the time that language was composed, was there any discussion of the possibility of readers expecting to see a centerfold of Jose Solana in the magazine?

A. Yes. I think either I brought it up or one of the editors brought it up. Because we always — the way we'd go about these cover line meetings is we'd have our master list. And then we had the location of where we felt like things should be. So as I said to you, this was always where the cover subject would be.

Q. Let me stop you.

You're pointing to the space where the "12 Sizzling Centerfolds" language is?

A. Yes.

Q. And that ordinarily is where language pertaining to the cover subject would appear on a cover —

A. Yes.

Q. — of Playgirl?

A. So originally, you know, we would go about it where, say, okay, now here's our cover subject. What are we going to say about him. But we had already decided that we were going to use our TV Guys thing as a banner which is on top of the Playgirl logo, the "Primetime's Sexy Young Stars Exposed" headline.

* * * *

Ninth Circuit Appellant's ER 605:11-606:6

* * *

Q. Do you in specific remember any discussion at the cover line meeting about the possibility that readers might think that Jose Solano was one of the "12 Sizzling Centerfolds"?

A. I think so. I remember I didn't say anything. I think Christine may have said something. But I don't know. I can't put words in her mouth. But I know something was voiced because we'd always say this is always where the cover subject goes. So, you know, someone's going to think that he's naked in there.

Q. And you think it may have been Christine Garcia that said that at this meeting?

A. It may have been, yes. But I'm not sure.

Q. Do you remember if anything was said in response to that sentiment being voiced?

A. That was always kind of blown off.

Q. Blown off by whom?

A. Carmine. It was just, so what.

* * * *

Videotape deposition of the defendant SERENA L. SPIEZIO, a witness, taken by plaintiff, pursuant to subpoena, held at the offices of Hale and Dorr, LLP 405 Lexington Avenue, New York, New York 10174 on November 1, 2000 at 4:45 p.m., before Robert M. Levine, CM, a Shorthand Reporter and Notary Public of the State of New York.

Ninth Circuit Appellant's ER 687:8-688:10

* * *

Q. Let me direct your attention to what's been described to me previously as the banner.

Is the phrase "Primetime's Sexy Young Stars Exposed", what's described as a banner —

A. Yes.

Q. — on this cover?

Okay, taking a look at that banner, do you think it would be reasonable for somebody seeing this cover as a whole, including the picture of Jose Solano, to expect to see nude photos of Jose Solano inside the magazine?

MR. RAYGOR: Same objection. It asks her to guess what might be in somebody's head when they read that.

A. Yes.

Q. Why?

A. Because it says TV Guys and they're being exposed. And it's Playgirl magazine. What else would they be exposing but their bodies?

Q. Is that because Playgirl magazine regularly exposes the bodies of the men that it features?

A. Well, that's what it's there for.

Q. So is the answer yes?

A. Yes.

* * * *

Supreme Court, U.S.
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In The

Supreme Court of the United States

PLAYGIRL, INC.,

Petitioner,

v.

JOSE SOLANO, JR.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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I. SOLANO HAS NOT ADDRESSED HIS FAILURE TO PROVIDE ANY EVIDENCE THAT ANY READER ACTUALLY UNDERSTOOD THE COVER TO SEND A FALSE MESSAGE ABOUT SOLANO.

It is respondent Solano's burden to provide *some* evidence on the following false light element: whether petitioner Playgirl's January 1999 cover was actually understood by the readers to whom it was addressed as sending a false message about Solano. (Petition, at 22-23.) Solano's opposition brief[1] nowhere points to any such evidence, and instead only indirectly *suggests* that Playgirl's own editors "conceded" or "admitted" that the language *could* be read this way. (Opposition, at 12.)

Even if this were the case (and Playgirl disputes this characterization),[2] Playgirl's editors do not qualify as "the readers to whom Playgirl is addressed." First, editors involved in the composition of magazines read the cover with knowledge and experience average readers do not have. Second, a reader sees the magazine in the neutral environment of a mailbox or a newsstand. The editors, however, were questioned in the context of a lawsuit that asserts the primacy of one meaning for certain language over many other possible meanings. Their testimony is not independent; nor can it convey what actual readers thought at the time of publication. The Ninth Circuit failed to recognize this complete failure of any proof, and, accordingly, its reversal and remand is clear error.

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[1] Solano's opposition brief was filed two days after the submission deadline of October 15, 2002.

[2] For example, Solano simply stitches together a number of Senior Vice President Carmine Bellucci's answers to deposition questions divorced from the context of the cover, without asking what Bellucci thought the cover as a whole conveyed. Solano also improperly omits the first question in a series about the disputed cover word "exposed," and Bellucci's answer, which stated that to him the word meant "reportage" or "journalistic exposure" – not nudity. (Reply App. 2-3.)

II. PLAYGIRL'S CHALLENGE TO THE "REASONABLY POSSIBLE" STANDARD IS LIMITED TO A NARROW FACTUAL CIRCUMSTANCE.

Solano's citations to multiple decisions applying the "reasonably possible" standard miss the point.[3] Playgirl does not deny the test is appropriate where a single statement is being evaluated for its truth or falsity. Application of the standard in that context at least provides some notice; editors can avoid the risk of lawsuits by looking for text with possible defamatory content. Playgirl argues only that a different standard is required in a particular, limited fact situation – when a plaintiff asserts that juxtaposition of multiple disparate elements on a magazine cover may convey a message not clearly conveyed by text alone.

In this narrow situation, the "reasonably possible" standard overregulates speech and substantially risks chilling it. It is impossible for editors to begin to identify the risk – to guess which elements in which combination a jury might through some extremity connect to find a false message. Yet the consequences of not doing so are huge – the possibility of a large verdict and the expense of extended litigation. Studies show the steady rise over the years in jury damages awards when a defamation case goes to trial, and the corresponding expense in litigation of such cases. In 1989 and 1990 the average award exceeded $4 million. *See* David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 514 (1991). At least

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[3] As to the contention that application of the "reasonably possible" standard did not subvert justice in this particular case, Playgirl has standing to challenge an overbroad standard even if the Court finds that the facts of this particular case do not implicate the risks it articulates. *See Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981); *Secretary of State v. J.H. Munson Co.*, 467 U.S. 947, 956 (1984) (citing the overbreadth doctrine as an exception to the general standing principle that requires people to assert only their own rights).

one commentator has noted that the high stakes of defamation litigation and its unpredictability mean parties are likely to spend more to litigate the case than the actual chances of recovery would support. *Id.* at 515 (1991) ("This is probably one reason why legal fees account for about eighty percent of the total cost of libel suits against the press.") (citing as the source of that figure Rodney A. Smolla, SUING THE PRESS 75 (1986)).

Publishers will never stop plaintiffs from filing lawsuits, and under a notice pleading standard may not realistically be able to obtain a dismissal at the pleading stage. Summary judgment thus is an important tool for protecting speech because it is the only point at which the real costs – both monetary and societal – of a lawsuit can be limited. Where, as here, the intersection of facts and the standard used by the Ninth Circuit effectively eliminate the availability of summary judgment,[4] publishers are likely to self-censor, stifling creativity in presentation of truthful speech, because every lawsuit will result in an expensive trial. The cumulative harmful public effect of this chilling of speech must outweigh any interest in compensating an individual for hurt feelings alone.

Playgirl's proposal – to require a showing of special damages before permitting a false light case based on juxtaposition to move forward[5] – addresses this narrow issue without rewriting the law wholesale. It recognizes the risk to the public good posed by a narrow theory of

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[4] Where few or no cases are decided on summary judgment, the role of the fact-finder is unduly elevated. Changing the standard in this narrow set of circumstances does not "sap" the role of the fact-finder, as Solano argues, but rather restores the balance that exists in defamation and false light cases based on text only (as opposed to juxtaposition).

[5] The proposed alternative standard is further limited by only applying where an innocent message is *reasonable* in context. Solano's use of the phrase "conceivably susceptible to an innocent construction" is not what Playgirl proposed.

recovery and asks individuals to show an objective verification of harm to justify that risk. It does not eliminate general damages. If a plaintiff could show special damages as a threshold issue, the case could move forward with the full range of penalties available. If not, the case would simply be dismissed. If this contradicts *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), it is an exceedingly limited and practical exception narrowly tailored to protect important speech concerns.

III. THE COVER DID NOT CONTAIN INTENTIONALLY FALSE SPEECH: SOLANO'S EVIDENCE RE ACTUAL MALICE IS NOT "CLEAR AND CONVINCING."

Playgirl has never argued that Solano must demonstrate that he is *certain* to win at trial on the actual malice issue. But *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), requires that the heightened clear and convincing proof standard for actual malice be taken into consideration at summary judgment; as a result, something more substantial than a mere conflict of the evidence, let alone a conflict created by internally unreliable evidence, is required.[6] None of the evidence Solano cites is sound.

Bellucci's alleged directive that staffers "sex up" the magazine's covers is purely circumstantial. Associate editor O'Rourke testified that such statements were made over a period of several months, not just for the January 1999 issue. (Solano App 7a.) It is not reasonable to infer

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[6] Playgirl also has never disputed that circumstantial evidence may factor into a court's or jury's decision about actual malice, but this Court could not have been more clear in its warning in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), that "courts must be careful not to place too much reliance" on such evidence. *Id.* at 667-68. It has also made clear that only *justifiable* inferences must be drawn in favor of the non-moving party, *see Masson v. New Yorker Magazine*, 501 U.S. 496, 520-21 (1991) – not "all possible inferences," as Solano asserts, relying on lower court decisions.

that this was connected to Solano. O'Rourke did not say she was told to "sex up" headlines about Solano. Solano provided no evidence that the content was not also "sexed up" at the same time, in which case encouraging the headlines to match would simply be accurate.

O'Rourke's alleged testimony "about intentional use of the word 'exposed' to convey a false impression of nudity," (Solano App. 15) and her alleged admission that she "didn't feel like it was fair to do that" are contradicted by her own testimony. Solano's counsel asked her whether editors were concerned that readers might think "primetime's sexy young stars" would be depicted nude – not Solano specifically. O'Rourke's response – including "some of us didn't feel like it was fair to do that" – was so vague as to time that Solano's counsel asked her to focus specifically on the meeting for the January 1999 issue: "Do you remember any particular discussion about the banner 'Primetime's Sexy Young Stars Exposed?'" O'Rourke answered: "*Not really*." (Reply App 12-13.)

Solano's characterization of O'Rourke's testimony about the "12 Sizzling Centerfolds" line – that it was placed where text regarding the cover model ordinarily appeared and that this "was done for a reason" – is misleading. O'Rourke explained that *design considerations* were the reason for the change (Reply App. 13-14):

> [W]e had already decided that we were going to use our TV Guys thing as a banner which is on top of the Playgirl logo, the "Primetime's Sexy Young Stars Exposed" headline. So being that we already had that, we were then talking about, okay, what's the next biggest thing we have in here. And the next biggest thing we had in there was the Man Of The Year ballot. But we didn't just want to put Man Of The Year ballot because that's just boring. So we wanted to give the illustration that there were 12 centerfolds in there. . . . So then we came up with this cover line for "12 Sizzling Centerfolds," and we put it there. Because I remember talking with Carmine. We thought that the 12 number would pop

> out at you well over here where usually the cover, subject cover line would go.[7]

O'Rourke's statement "someone's going to think that he's naked in there," read in context, refers only to the "12 Sizzling Centerfolds" headline (not broadly to "the headlines juxtaposed with Mr. Solano's photograph") and again is unclear as to time and substance – replete with words like "I think" and "I don't know," and time-generic statements like "we'd always say." (Reply App. 14.) She also testified that she and other junior editors overanalyzed such things because they were too methodical, and that the most ever said to Bellucci about putting the "12 Sizzling Centerfolds" headline to the left of Solano's photo is that it would "look strange," not that readers would think Solano was nude. (Reply App. 15.)

The final testimony on which Solano relies – that O'Rourke had a general recollection that the concerns were brought to Bellucci's attention[8] – bears special scrutiny. Here, Solano suggests that the fact that someone may have raised a concern about how the headlines read is a factor favoring liability. The implications of this are alarming. Debate and discussion should be encouraged so that editors can avoid mistakes. If simply talking about an issue can turn a "mistake" into "intent," plaintiffs will suffer because editors will find that they are better off not speaking up at all.

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[7] Art Director Joanne Chiaramonte confirmed this: "The '12 Sizzling Centerfolds,' that's something we do annually. Any of our readers know that once a year they get to vote for their centerfold, vote for Man Of The Year." (Reply App. 10.)

[8] Solano's citation of this testimony is misleading. Solano cuts off the actual testimony in the appendix at a point that suggests that Bellucci "blew off" such concerns. In fact, O'Rourke follows up by saying that Bellucci "really didn't think there was anything wrong with having 12 there next to the body because he didn't think it was suggesting anything." (Reply App. 14-15.)

IV. IN A FALSE-MESSAGE-BY-JUXTAPOSITION CASE, EXISTING ACTUAL MALICE STANDARDS DO NOT SUFFICIENTLY PROTECT SPEECH.

The actual malice standard offers far less protection than usual for speech in cases based on a possible false message by juxtaposition, where the issue is not whether a juxtaposition of words and photos is fundamentally "true" or "false," but rather the meaning a group of editors thinks a group of third-party readers will take from it -- and what the likelihood of one interpretation over another may be.

This raises difficult issues. For example, where the test is what the "average reader" will perceive, courts should not send a case to trial based on someone raising a mild concern about how a few sensitive readers "might" perceive the cover. In this context, "knowledge" of falsity and "reckless disregard" of truth relate to an editor's predictive abilities, and editors may disagree about the certainty with which a particular message is conveyed. One editor may raise the issue out of an abundance of caution and other more senior editors may consider the entire presentation of a page and decide that, taken as a whole, negative meanings do not predominate.[9] The failure of the actual malice inquiry to address the complications of this issue in this limited factual context supports the need

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[9] That is what happened here. The editors did not think the "Primetime's Sexy Young Stars" line would suggest Solano was nude because they believed that readers knew that when they had nude celebrity photos, they clearly stated that; and they understood "exposed" to convey that they were revealing "sexy pictures and information" or "explaining a revealing story." (Reply App. 6-7, 9-10.) They did not think readers would think "12 Sizzling Centerfolds" applied to Solano because it was an annual feature, because Solano's name was clearly used in another cover line, because Playgirl never used two separate cover lines to refer to the same feature and because there were design reasons for it being there. (Reply App. 7-8, 10-11, 13-14.)

for a more effective "gatekeeping" mechanism in advance of the actual malice inquiry.[10]

V. THAT THERE MAY BE NO FIRST AMENDMENT PROTECTION FOR INTENTIONALLY FALSE SPEECH DOES NOT MEAN THAT AN ACTION LIES FOR MISAPPROPRIATION WHEREVER THERE IS FALSE SPEECH.

Solano addressed the misappropriation issue by stating that the First Amendment does not protect intentionally false speech, but this does not truly address the point. That there may be no First Amendment protection for knowingly false speech does not mean that wherever there is false speech, there must be a misappropriation. Playgirl submits that even if a court were to find that an intentionally false message was conveyed, the situation simply falls outside the scope of this tort because Playgirl's use of Solano's photo and name does not implicate a commercial or merchandising right of Solano.

Put another way, the tort focuses not on *falsity*, but on the *use* of someone's name or image. Because the January 1999 issue contained a news story about Solano, it cannot be disputed that Playgirl would have been entitled to use Solano's name and image on the cover to publicize that story had there been no alleged falsity regarding the cover lines. *See Cher v. Forum International, Inc.*, 692 F.2d 634,

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[10] Despite Solano's argument, this Court has determined that the constitutional limitations on the substantive law addressing First Amendment activity may not alone be sufficient to protect speech. A prominent example of this is this Court's decision in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), in which it determined that the courts must independently review on appeal the evidence supporting a trier of fact's decision, in order to ensure that it meets the constitutional threshold for sufficiently protecting speech. *Id.* at 498-513.

638 (9th Cir. 1982); *Page v. Something Weird Video*, 960 F. Supp. 1438 (C.D. Cal. 1996).[11]

Because there was no misappropriation in the mere use of the name and photo, it is apparent that what upsets Solano is what is conveyed by the headlines surrounding his name and image, none of which contains his name. Playgirl's position is that such claims, based solely on falsity and not in any real sense on misappropriation of Solano's merchandising rights, are not properly addressed by this tort, and instead sound in defamation or false light.[12]

VI. CONCLUSION

Respondent Solano filed this suit because he did not like seeing his photograph on the cover of *Playgirl* magazine. While many may sympathize, the law does not permit recovery on such a theory. The Ninth Circuit was correct when it said, "Solano cannot prevail on his false light claim simply by arguing that Playgirl put him on the cover of a magazine that contains explicit content." (App. 7a.) For this it cited *Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527 (9th Cir. 1984), in which the Ninth Circuit said the plaintiff had no right to choose the forum in which his photo was displayed. *Id.* at 530.[13]

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[11] Unlike in *Eastwood v. Superior Court*, 198 Cal. Rptr. 342 (Ct. App. 1983), the story inside the magazine was not alleged to be false – Solano confirmed that it was true. Bellucci testified that Playgirl's practice, as a matter of simple "good journalism," was always to have an article about or some reference to the person featured on the cover inside the magazine. (Reply App 3.) He considered the piece on Solano inside the cover to be news. (Reply App 3-4.)

[12] This Court has emphasized the importance of ensuring that the perimeters of unprotected categories of speech are confined within narrow limits. *See Bose Corp.*, 466 U.S. at 505.

[13] Many other courts have made similar rulings. *See, e.g., Ann-Margret v. High Society Magazine, Inc.*, 498 F. Supp. 401 (S.D.N.Y. 1980); *Faloona v. Hustler Magazine, Inc.*, 607 F. Supp. 1341, 1356 (N.D.

(Continued on following page)

Although the Ninth Circuit stated that the *headlines* surrounding Solano's cover photograph – in combination with the context – created the impression of nudity, rather than the context alone, this is a false distinction: Not every headline on the cover can refer or does refer to Solano. Playgirl has a First Amendment right to publicize on its cover the nude and other content it does have, in addition to publicizing the story it has about Solano. If Solano cannot by law stop an explicit magazine from using his photograph, he certainly should not be able to choose whether the text surrounding his photograph is explicit, yet it is that asserted individual right to censor the press that Solano's suit seeks to accomplish. There must be a limit to how far an individual's personal tastes – even if shared by large segments of the society – can extend to control the content of a magazine. This case presents that limit, and for that reason, Playgirl requests that the Court grant its petition.

Respectfully submitted,

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October 28, 2002

Tex. 1985), *aff'd*, 799 F.2d 1000 (5th Cir. 1986); *Handelman v. Hustler Magazine*, 469 F. Supp. 1053, 1060 (S.D.N.Y. 1979) ("[M]agazines with sexually explicit text and photographs of genitalia are part of our contemporary scene. Successful candidates for the presidency of the United States consent to interviews in magazines of the same genre as Hustler.").

REPLY APPENDIX A

[Excerpts of Deposition Testimony]
[*Ninth Circuit APPELLANT's ER 519, 600, 602, 603-606, 976, 980-982, 988, 1002-1003, 1007, 1019-1023, 1051, 1059, 1066, 1079, 1082, 1116, 1119-1120, 1144-1149*]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOSE SOLANO, JR., Plaintiff, v. PLAYGIRL, INC. and DOES 1 through 25, inclusive, Defendant.	No. 00-01242 DT (Ex)

Videotape deposition of the defendant PLAYGIRL, INC. by **CARMINE BELLUCCI**, taken by plaintiff, pursuant to notice, held at the offices of Hale and Dorr, LLP, 405 Lexington Avenue, New York, New York 10174 on November 1, 2000 at 2:00 p.m., before Robert M. Levine, CM, a Shorthand Reporter and Notary Public of the State of New York.

[ER 980-982]

Q What does Playgirl have in common with Time magazine?

A Provide news and entertainment to a reader.

Q What kind of news does Playgirl provide?

A Well, review books, albums. We'll often provide entertainment news and news interests. Interesting news stories to a female audience.

Q News stories on what subjects?

A The latest contraceptive.

Q Any other news topics that Playgirl provides content on for its readers?

A Relationship issues.

Q Can you think of any other news topics that Playgirl reports on for its readers?

A Women's health.

Q Any others?

A Women's entertainment.

. . .

Q Is there anyone who works for Playgirl as a salaried employee whose job it is to seek out and report the news?

A Yes.

. . .

[ER 519]

Q What's your understanding of the word exposed?

A It's reportage. It's journalistic exposure.

Q Can exposed also refer to photographic exposure?

A Yes.

Q Can exposed also refer to being exposed in a nude photograph?

A Perhaps.

. . .

[ER 988]

Q What are some other factors that enter into your selection of a cover photograph for the cover of Playgirl magazine?

A The cover image must be featured inside.

Q What do you mean by "the cover image must be featured inside?"

A Who was on the cover. We must have an article or some reference to him inside the publication also.

Q Why is that a factor you take into account?

A Just good journalism.

Q Why do you consider that to be good journalism?

A Because I wouldn't present an image on the cover if there was not something that they could read about that individual inside.

. . .

[ER 1002-1003]

Q Is there anything about the description of Mr. Solano that appears on this page that you would consider news?

A Yes.

Q Tell me what content that appears on this page you consider to be news?

A We're talking about the character that he plays, we're giving information on the television show in which he appears, the character that he plays within that television show. We are talking about – we're giving information on his background. He was a junior Olympic soccer champion. A former U.S. Navy medic. Desert Storm veteran. We also gave some other pertinent information. He was voted Man of the Year by Young Miss magazine. I would consider all of that relevant information, news information.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOSE SOLANO, JR., Plaintiff, v. PLAYGIRL, INC. and DOES 1 through 25, inclusive, Defendant.	No. 00-01242 DT (Ex)

Rough Draft

MR. GREEN:

Good morning.

Here begins Videotape No. 1 of the deposition of **CLAIRE VIGUERIE** taken in the matter of Solano versus Playgirl in the U.S. District Court of Central District California. The case number is 00-01242 DT (Ex). Today is January 20th, 2001. The time is approximately 12:06 PM. The deposition is being taken at Professional Shorthand Reporters, Incorporated, located at 601 Poydras

Street, Suite 1615, New Orleans, Louisiana, and was made at the request of Jonathan H. Anschell of the law offices White, O'Connor, Curry, Gatti & Avandazo. The videographer is Patrick Green employed with Esquire Deposition Services located at 622 Wilshire Boulevard, Los Angeles, California.

. . .

[ER 1119-1120]

Q If I were to ask you to describe in a sentence or two what the purpose or mission of Playgirl Magazine was when you were the editor in chief, could you do that?

A I'll think for one second.

Q Sure.

A I wanted to provide erotic entertainment – erotic entertainment to women and address women in a mature, adult and sexy way that I found was not being done in other magazines.

Q When you were editor in chief, did you consider Playgirl to be a news magazine?

A A nude or a news?

Q News. I'll spell it so the record is clear. N-E-W-S.

A Yes.

Q You did?

A Yes.

Q In what way was Playgirl a news magazine?

A We published stories that we thought would appeal to women. We published very informative sexual education articles, we talked about women's issues that I think got short shrift in other women's magazines, and we also reported on – we balanced that with who we think is hot right now, these are people you should be noticing, what CD you might like, Internet sites that are interesting to you. It was an entertainment but also a lot of information magazine.

. . .

[ER 1144-1145]

Q At the time the January 1999 cover was put together, did you have an understanding of what message was being conveyed by the use of the term "Primetime's Sexy Young Stars Exposed"?

A Yes.

Q And what was your understanding?

A That we would reveal sexy pictures and information about these men.

. . .

[ER 1146]

Q So would it be fair to say that the purpose of this banner line, the way it was written when the January 1999 issue was being prepared, was to convey the impression that there were nude photos of the television stars inside the magazine without expressly saying that?

A Sexy photos I would say more. We would – I mean, I would want people to think that there would be something that they hadn't seen of Jose Solano inside, but without stating that.

Q Okay. What do you mean by people thinking that there was something about Jose Solano that they hadn't seen before?

A Well, we always tried to give something a Playgirl twist, which was just, you know, "I like Jose Solano, I see him on Baywatch, but Playgirl is going to tell me something about him that I don't know."

. . .

[ER 1147-1149]

Q Let me direct your attention a little bit further down and to the left. Do you see the phrase that says "12 Sizzling Centerfolds Ready To Score With You"?

A Yes

Q Now, is that the place on the cover of the magazine where there's ordinarily a headline pertaining to the cover man, the man who appears on the cover?

A I don't think it's ever any set placement.

Q Okay. Now, as you can recall, at the time the January 1999 issue of Playgirl was being prepared, did you think it was possible that somebody seeing this magazine might conclude from the "12 Sizzling Centerfolds Ready To Score With You" headline that there was a centerfold of Jose Solano inside the magazine?

A No.

Q Why not?

A Because I know how we do our cover lines and how cover lines are generally done. It's not two separate cover lines relating to the same feature.

Q And that's something you know based on your experience at Playgirl. Correct?

A I think I noticed that on other magazines, too. I generally look in the bottom right corner for who the person on the cover is.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOSE SOLANO, JR., Plaintiff, v. PLAYGIRL, INC. and DOES 1 through 25, inclusive, Defendant.	No. 00-01242 DT (Ex)

Videotape deposition of the defendant PLAYGIRL, INC. by **JOANNE CHIARAMONTE,** taken by plaintiff, pursuant to notice, held at the offices of Hale and Dorr, LLP, 405 Lexington Avenue, New York, New York 10174 on November 2, 2000 at 10:30 a.m., before Robert M. Levine, CM, a Shorthand Reporter and Notary Public of the State of New York.

[ER 1019-1020]

Q Do you have an understanding of the meaning of the banner that appears on this cover "Primetime's Sexy Young Stars Exposed"?

A I suppose I have my own feelings about what it means.

Q And that's all I'm entitled to. So what do you understand this banner to mean?

A TV actors in primetime of course who are attractive with – to me, you know, it's a journalistic story inside.

Q Do you have an understanding of the word exposed?

A Again, I have my own – my own feeling.

Q Could you tell me what it is?

A To me it's a word that journalists/editors use to explain a story, a revealing story.

. . .

[ER 1021-1022]

Q My question is whether in January whether when you worked on the January 1999 issue of Playgirl magazine, whether you considered that possibility, that a reader might believe based on the banner "Primetime's Sexy Young Stars Exposed", that pictures of Jose Solano nude appeared inside the magazine?

A Again, I can't guess as to what somebody else, a reader is going to guess. From my own personal opinion, being familiar with the magazine of course as the art

director, no. If we had Jose Solano nude, we would clearly state that we had him nude.

. . .

[ER 1023]

Q What about the headline that reads, "12 Sizzling Centerfolds"? As you look at Exhibit 1 you see that the word centerfold touches onto Jose Solano's shoulder. Do you see that?

A Sure.

Q Did you give any thought to the possibility that a Playgirl reader seeing that headline might expect to see a centerfold of Jose Solano in the magazine?

MR. RAYGOR: Objection. Calls for speculation as to what the Playgirl reader might or might not expect.

Q And again, Ms. Chiaramonte, I'm not asking you to read the minds of others. I'm just asking whether you personally gave any thought when you were working on the cover of this issue to the possibility that readers might expect to see a Jose Solano centerfold in the magazine?

A In my opinion, no. The "12 Sizzling Centerfolds," that's something we do annually. Any of our readers know that once a year they get to vote for their centerfold, vote for Man Of The Year. So, you know, I really didn't take that into consideration. There's many things that touches skin that for visual reasons we did.

Q As you sit here today, do you recall giving any thought at the time you worked on the January 1999 issue as to whether potential readers or members of the public might see the cover and think that there was a Jose

Solano centerfold inside the magazine? Do you remember thinking about that as you sit here today?

A Again, it was a while ago. But I would say no. Because it clearly states here this is Jose Solano and this is referring to him.

MR. RAYGOR: For the record –

THE WITNESS: I'm sorry?

MR. RAYGOR: For the record, the witness is pointing at the lower right-hand corner touching the phrase that says "Baywatch's Best Body, Jose Solano" on the first page of Exhibit 1.

Q Did you give any thought when you were working on the January 1999 issue of Playgirl magazine to the possibility that a reader seeing the phrase "Hot Celebrity Buns" and seeing a photograph of Jose Solano on the cover might expect to see Mr. Solano's buns on the inside of the magazine?

MR. RAYGOR: Again, objection. Calls for speculation as to what any reader reading that might expect or not.

Q Did you consider that possibility, Ms. Chiaramonte?

A Again, like I stated before, if we did have Jose Solano's buns in the magazine, it would have been right here. So I did not think that the reader would think that.

UNITED STATES DISTRICT COURT
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WESTERN DIVISION

JOSE SOLANO, JR., Plaintiff, v. PLAYGIRL, INC. and DOES 1 through 25, inclusive, Defendant.	No. 00-01242 DT (Ex)

Videotape deposition of **THERESA O'ROURKE**, a witness, taken by plaintiff, pursuant to subpoena, held at the offices of Hale and Dorr, LLP, 405 Lexington Avenue, New York, New York 10174 on November 2, 2000 at 2:00 p.m., before Robert M. Levine, CM, a Shorthand Reporter and Notary Public of the State of New York.

[ER 602, 1079]

Q Do you remember anyone in the cover line meeting for the January 1999 issue saying anything in particular about the possibility that readers might expect to see primetime's TV stars nude inside the magazine based on the phrase "Primetime's Sexy Young Stars Exposed"?

A Yes. That would be, you know, a subject of debate every time we had a cover line meeting. Because some of us didn't feel like it was fair to do that.

. . .

Q Let me see if I can focus your recollection specifically on the meeting regarding the January 1999 issue. And if you can sort of separate that in your mind in any way from the other cover line meetings. Do you remember

any particular discussion about the banner "Primetime's Sexy Young Stars Exposed"?

A Not really.

. . .

[ER 600]

Q Let me ask you also to focus on the phrase "12 Sizzling Centerfolds Ready To Score With You."

A Hmm-hmm. Yes.

Q At the time that cover line was written did you know that it would be appearing somewhere near Jose Solano's picture on the January 1999 cover?

A Yes. It was done for a reason.

. . .

[ER 603-606, 1082]

Q You're pointing to the space where the "12 Sizzling Centerfolds" language is?

A Yes.

Q And that ordinarily is where language pertaining to the cover subject would appear on a cover –

A Yes.

Q – of Playgirl?

A So originally, you know, we would go about it where, say, okay, now here's our cover subject. What are we going to say about him. But we had already decided that we were going to use our TV Guys thing as a banner which is on top of the Playgirl logo, the "Primetime's Sexy

Young Stars Exposed" headline. So being that we already had that, we were then talking about, okay, what's the next biggest thing we have in here. And the next biggest thing we had in there was the Man Of The Year ballot. But we didn't just want to put Man Of The Year ballot because that's just boring. So we wanted to give the illustration that there were 12 centerfolds in there. Which, I guess, yes, there were 12 centerfolds because there were 12 men in there who were centerfolds for Man Of The Year ballot. So then we came up with this cover line for "12 Sizzling Centerfolds," and we put it there. Because I remember talking with Carmine. We thought that the 12 number would pop out at you well over here where usually the cover, subject cover line would go.

Q Do you in specific remember any discussion at the cover line meeting about the possibility that readers might think that Jose Solano was one of the "12 Sizzling Centerfolds"

A I think so. I remember I didn't say anything. I think Christine may have said something. But I don't know. I can't put words in her mouth. But I know something was voiced because we'd always say this is always where the cover subject goes. So, you know, someone's going to think that he's naked in there.

Q And you think it may have been Christine Garcia that said that at this meeting?

A It may have been, yes. But I'm not sure.

Q Do you remember if anything was said in response to that sentiment being voiced?

A That was always kind of blown off.

Q Blown off by whom?

A Carmine. It was just, so what.

Q Okay.

A So . . .

Q Did Carmine Bellucci ordinarily in Playgirl cover meetings belittle the suggestion that readers might expect to see the cover man nude inside the magazine because of the cover language?

A I don't think he was belittling it, like he was just so flippant about it. I just think that he had gotten so used to this was always what we did. So what are we doing. We're not – you know, he didn't, really didn't think there was anything wrong with having 12 there next to the body because he didn't think it was suggesting anything. Whereas, with us, we worked there and we knew that the cover subject always went there. So we, I think, coming into it we were kind of – we would overanalyze things so . . .

Q As you recall –

MR. RAYGOR: Please try not to interrupt her answers.

Q I'm sorry, Ms. O'Rourke. Were you done?

A Yes, pretty much. I just said that we would overanalyze things because we knew that we dealt with this like so methodically. Here's the cover, subject cover right now. Then we're going to put this. And our features are going to go lower down. So we would naturally just say, hey, isn't that going to look strange if we do that. And Carmine would just be like, "Oh, so what." Okay?

Q Just so that our record is clear, there were a number of you who would participate in the Playgirl cover meetings who regularly worked exclusively on Playgirl, right?

A Yes.

Q And when you worked with Mr. Bellucci did he work on other magazines as well as Playgirl?

A Yes.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

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Videotape deposition of **SERENA SPIEZIO**, a witness, taken by plaintiff, pursuant to subpoena, held at the offices of Hale and Dorr, LLP, 405 Lexington Avenue, New York, New York 10174 on November 1, 2000 at 4:45 p.m., before Robert M. Levine, CM, a Shorthand Reporter and Notary Public of the State of New York.

[ER 1059]

A . . . Joanne and Carmine are the final decision-makers of the cover.